No. 91-471

Supreme Court, U.S.
FILED
SEP 20 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC., PETITIONER

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA; ALABAMA DEPARTMENT OF REVENUE; AND JAMES M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA DEPARTMENT OF REVENUE, RESPONDENTS

Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

JAMES T. BANKS
JOHN T. VAN GESSEL
Chemical Waste Management, Inc.
3003 Butterfield Road
Oak Brook, Illinois 60521
(708) 218-1500

DRAYTON PRUITT, JR.
Pruitt, Pruitt & Watkins, P.A.
Courthouse Square
P.O. Box 1037
Livingston, Alabama 35470
(205) 652-9627

ANDREW J. PINCUS *
KENNETH S. GELLER
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0628

FOURNIER J. GALE III
H. THOMAS WELLS, JR.
Maynard, Cooper, Frierson & Gale, P.C.
1901 Sixth Avenue, North
2400 AmSouth/Harbert Plaza
Birmingham, Alabama 35203
(205) 254-1000

Counsel for Petitioners

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

In April 1990, the State of Alabama adopted Act No. 90-326, a statute that taxes and otherwise regulates the disposal of hazardous waste within Alabama. Petitioner subsequently commenced this action challenging three provisions of the Act under the Commerce Clause. The questions presented are:

1. Whether a $72 per ton disposal tax that on its face applies only to waste generated outside of Alabama violates the Commerce Clause.

2. Whether a $25.60 per ton disposal tax that applies only to waste disposed of at "commercial" hazardous waste disposal facilities, and thereby exempts most of the hazardous waste generated and disposed of within Alabama, discriminates in its practical effect against out-of-state waste in violation of the Commerce Clause.

3. Whether a provision limiting the amount of waste that may be disposed of annually at a commercial hazardous waste disposal facility, which was motivated by an intention to reduce the amount of out-of-state waste disposed of in Alabama and is structured to achieve that purpose without substantially limiting the amount of in-state waste that may be disposed of in Alabama, violates the Commerce Clause.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Chemical Waste Management, Inc., states that its parent corporation is Waste Management, Inc. Chemical Waste Management, Inc.'s subsidiaries (other than wholly owned subsidiaries) are The Brand Companies, Inc. and Cemtech Management, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC., PETITIONER

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA;
ALABAMA DEPARTMENT OF REVENUE; AND
JAMES M. SIZEMORE, JR., COMMISSIONER OF THE
ALABAMA DEPARTMENT OF REVENUE, RESPONDENTS

Petition for a Writ of Certiorari to the Supreme Court of Alabama

---

PETITION FOR A WRIT OF CERTIORARI

Chemical Waste Management, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (App., *infra*, 1a-49a is not yet reported. The opinion of the Circuit Court of Montgomery County (App., *infra*, 50a-96a) is unreported.

JURISDICTION

The judgments of the Supreme Court of Alabama were entered on July 11, 1991. App., *infra*, 97a-101a. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Alabama Act No. 90-326 is reprinted at pages 102a-114a of the appendix to this petition.

STATEMENT

Petitioner Chemical Waste Management, Inc. ("CWM") operates a commercial hazardous waste disposal facility

located near the town of Emelle, Alabama ("the Emelle facility"), that is authorized to treat and dispose of hazardous waste under both federal and state law. Most of the waste disposed of at the Emelle facility is generated in other states and moves in interstate commerce to Alabama for treatment and/or disposal. The facility plays a critical role in the safe disposal of the Nation's hazardous waste. As the United States has observed, "Emelle is important from a nationwide perspective because it is the largest hazardous waste management facility in the United States and the ultimate depository for over one third of the waste materials shipped off-site from Superfund [cleanup] sites." Brief for the United States at 9, *National Solid Wastes Management Ass'n* v. *Alabama Dep't of Environmental Management ("NSWMA")*, 910 F.2d 713 (11th Cir. 1990), modified, 924 F.2d 1001, cert. denied, 111 S. Ct. 2800 (1991).

For the last three years, the State of Alabama has tried to prevent the disposal at the Emelle facility of waste generated in other states. Alabama's efforts repeatedly have been rebuffed by the courts—until now. The State's latest assault on non-Alabama waste, Act No. 90-326, furthers its purpose through three different provisions: one that facially discriminates against interstate waste, one that discriminates in practical effect, and a third that incorporates both types of discrimination. Remarkably, the Alabama Supreme Court held that Act No. 90-326 nonetheless complies with the Commerce Clause in all respects. This petition seeks review of that unprecedented interpretation of the Commerce Clause.

1. *Regulatory Background.* Disposal of hazardous waste is strictly regulated under federal law. The Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*, and the regulations promulgated by the Environmental Protection Agency ("EPA") pursuant to that statute (see 40 C.F.R. Parts 260-271), impose elaborate requirements for the safe handling and disposal of hazardous waste. See *Alabama* v. *United States Environmental Protection Agency*, 871 F.2d 1548,

1552 (11th Cir.), cert. denied, 110 S. Ct. 538 (1989) (citations omitted). RCRA provides that all operators of hazardous waste treatment, storage, or disposal facilities must obtain permits fixing the terms on which the operator may engage in those activities. 42 U.S.C. § 6925.

Federal law recognizes that hazardous waste is an unavoidable byproduct of virtually all industrial processes and that some hazardous waste must be disposed of in landfills. Congress in 1984 specified that land disposal of hazardous waste would be permitted only after such waste is treated with the "best available demonstrated technology," or in compliance with the applicable treatment standard, in order to reduce the waste's toxicity and mobility. 42 U.S.C. § 6924. The EPA has promulgated regulations setting forth these technological requirements. See generally 40 C.F.R. Part 268; 55 Fed. Reg. 22520, 22523 (1990).

Moreover, federal law provides that the operator of a hazardous waste disposal facility is responsible for ensuring the containment of waste disposed of at that site. 40 C.F.R. § 264.110-264.120; see also 42 U.S.C. § 9607. In addition, the operator must provide "financial assurances" demonstrating the availability of funds to cover the closure of the facility and post-closure care for 30 years as well as liability insurance for injuries to third parties. 40 C.F.R. § 264.140-264.147. Finally, in the event the foregoing resources prove inadequate, generators, brokers, and transporters of the waste disposed of at a hazardous waste disposal facility are jointly and severally liable for the costs of remedial action if there is a release from such a facility. 42 U.S.C. § 9607.

Federal law also comprehensively regulates the transportation of hazardous materials. See 49 U.S.C. App. §§ 1801-1819; 49 C.F.R. Parts 171-180 (1990). Among other things, these provisions require transporters of hazardous materials to register with and obtain safety permits from the Secretary of Transportation (49 U.S.C. App. § 1805) and specify procedures for minimizing the

risk of and for redressing spills in transit. See 49 C.F.R. §§ 173.300, 173.510, 177.834, 177.854-177.860; *id.* Part 178. In addition, federal law requires transporters of hazardous materials to demonstrate financial responsibility of at least $5 million to cover the cost of remediating any spill of such materials that may occur in transit. Pub. L. No. 101-615, § 23, 104 Stat. 3244, 3272 (1990).

2. *The Emelle Facility.* CWM's Emelle facility has received a RCRA permit from the EPA, as well as a separate permit—issued by the EPA pursuant to the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*—authorizing the disposal of polychlorinated biphenyls ("PCBs") at the facility.[1] These permits establish that the Emelle facility "has complied with elaborate federal regulations designed to ensure the safe disposal of hazardous wastes * * *. To the extent these federal regulations can and do provide for the safe treatment and disposal of toxic wastes, CWM's Emelle, Alabama, facility poses no threat to the health and safety of the residents of Emelle or to other Alabama residents." *Alabama*, 871 F.2d at 1552-1553. Indeed, Governor Hunt has characterized the Emelle facility as "probably one of the safest such facilities in the country." Pl. Exh. 80.

The Emelle facility is a "commercial" hazardous waste disposal facility under Alabama law because it is "[a] site or facility receiving hazardous waste or hazardous substances * * * not generated on site, for disposal and to which a fee is paid or other consideration given for such disposal." Ala. Code § 22-30B-1(1). A substantial amount of the waste disposed of at the Emelle facility is generated in states other than Alabama and moves in interstate commerce to the Emelle facility. The trial court found that "[e]ighty-five to ninety percent of the

[1] The Emelle facility also is regulated under Alabama law. Currently, the facility is authorized to operate pursuant to the interim status procedures set forth in Ala. Code. § 22-30-12(i).

tonnage permanently buried at Emelle is from out-of-state." App., *infra*, 58a.

Hazardous waste is also disposed of within Alabama at facilities that do not qualify as "commercial," either because the waste is generated on site or because a fee is not charged for disposal. Virtually all of the hazardous waste disposed of at such facilities is generated within Alabama. Moreover, this waste accounts for a very substantial percentage of all of the Alabama-generated waste that is disposed of within the State.[2]

3. *Alabama's Efforts To Impede The Disposal In Alabama Of Waste Generated In Other States.* Over the past several years, Alabama repeatedly has sought to prevent the disposal within the State of hazardous waste generated in other states. In 1988 the State filed suit in an effort to halt the cleanup of an abandoned hazardous waste site in Texas because the waste was to be disposed of at the Emelle facility. This effort to stop the flow of waste at the State's borders was rebuffed by the Eleventh Circuit. Though dismissing the case on standing and jurisdictional grounds, that court admonished that "[t]o the extent plaintiffs * * * assert injury based on the out-of-state nature of these wastes, the Supreme Court has already held that the commerce clause bars such a distinction." *Alabama*, 871 F.2d at 1555 n.3.

Alabama's next attempt to thwart the movement of waste in interstate commerce was the enactment of Ala.

[2] In 1987—the most recent year for which data are available—over 3 million tons of hazardous waste were generated in Alabama. Pl. Exh. 27, at 44. Of that total, less than 30,000 tons were disposed of in commercial landfills. Robertson Dep. 155-158. About 7,500 tons were disposed of in noncommercial landfills (Pl. Exh. 27, at 62) and 690,000 tons were disposed of in noncommercial surface impoundments (*id.* at 64). Another 57,000 tons were shipped out of state for management and disposal. *Id.* at 46. Over 90% of the remaining 2.2 million tons of in-state waste was treated or stored in noncommercial surface impoundments and waste piles. *Id.* at 52, 53, 56. Those forms of treatment and storage come within Alabama's broad definition of "disposal." See page 19, *infra*.

Act No. 89-788 (codified at Ala. Code § 22-30-11(b)) in May 1989. That measure, popularly known as the Holley Bill, barred any commercial hazardous waste disposal facility located in Alabama from treating or disposing of hazardous waste generated outside Alabama if the state in which the waste was generated did not satisfy certain criteria specified by Alabama. Finding that the Holley Bill "distinguishe[d] among wastes based on their origin, with no other basis for the distinction," the Eleventh Circuit held that the Holley Bill violated the Commerce Clause. *NSWMA*, 910 F.2d at 720.

4. *The Challenged Statute.* In 1990, Alabama continued its assault on out-of-state waste by enacting Ala. Act. No. 90-326 (codified at Ala. Code § 22-30B-1.1 *et seq.*), the statute at issue in this case. The Act imposes two fees on the disposal of waste at commercial hazardous waste disposal facilities in Alabama. First, it levies a fee of $25.60 per ton ("the Base Fee") on all waste disposed of at such facilities. Second, the Act imposes a separate fee of $72 per ton ("the Additional Fee") expressly limited to waste generated outside Alabama and disposed of at such facilities. See Ala. Code § 22-30B-2. The Act also contains a provision that restricts the amount of waste that can be disposed of at commercial hazardous waste disposal facilities during any one-year period ("the Cap Provision"). The cap was fixed at the amount of waste received at such facilities during the year beginning July 15, 1990—the day the new fees took effect. See *id.* § 22-30B-2.3. The annual limit may be exceeded if necessary "to protect human health or the environment in the state, or to allow the state to comply with its obligations to assure disposal capacity pursuant to applicable state or federal law." *Ibid.*

When Governor Hunt signed Act No. 90-326 into law, he stated:

> On the day I took office just over three years ago, toxic waste producers in other states could drive their problems to Alabama and dump them for only $6 a ton. But today, Alabama is taking down the sale sign. With this law it's going to cost $112 a ton to bring hazardous waste into Alabama from other states. Let the message go out. There are no more environmental bargains to be found here.

Pl. Exh. 80.[3] Other state officials made similar pronouncements during the legislature's consideration of this statute. See, *e.g.*, Pegues Dep. 32-33 (Director of the Alabama Department of Environmental Management ("ADEM")).

5. *The Decisions Below.* In May 1990, CWM commenced this action in Alabama circuit court challenging Act No. 90-326 on federal and state constitutional grounds. Following a trial, the circuit court held that the $72 Additional Fee violated the Commerce Clause, but rejected CWM's challenges to the Base Fee and Cap Provision.

The circuit court found that "the Additional Fee facially discriminates against waste generated in States other than Alabama * * *. Waste generated within Alabama * * * is completely exempted from the Additional Fee." App., *infra*, 85a (emphasis in original). The court rejected the State's proffered environmental and safety justifications for singling out waste from other States:

> [H]azardous waste generated in Alabama is just as dangerous as such waste generated in other states. All of the safety and environmental concerns set forth at trial * * * apply with equal force to hazardous waste generated in and out of the State of Alabama. * * * This Court finds that the record contains no evidence of any difference between in-state waste and out-of-state waste other than the waste's state of origin.

Id. at 86a.

---

[3] The taxes levied on interstate waste by Act No. 90-326 totalled $97.60 per ton; other provisions imposed additional exactions amounting to $14.40 per ton.

The court also concluded that the Additional Fee could not be justified on the ground that it imposes on out-of-state waste generators their fair share of the costs to Alabama of waste disposal facilities located within the State. The court found insufficient evidence that in-state generators bore a disproportionate share of these costs prior to the enactment of the Additional Fee and no evidence that the Fee equalized the burden on in-state and out-of-state generators. App., *infra*, 88a n.6. Accordingly, the court concluded that the Additional Fee violates the Commerce Clause.

The court reached a different conclusion with respect to the Base Fee. It began by stating that strict scrutiny is required under the Commerce Clause only if the challenged regulation is "discriminatory on its face or in practical effect." App., *infra*, 65a. According to the court, "any evidence attributing to any state officials any motive of discrimination against interstate commerce" is "irrelevant" to the level of scrutiny required. *Id.* at 66a n.1.

The court then stated that the Base Fee does not discriminate against out-of-state waste on its face or in its practical operation. App., *infra*, 66a. It therefore upheld the Base Fee under the balancing test set forth in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), concluding that "the burden the Base Fee imposes on interstate commerce is not clearly excessive in relation to the benefits it produces" (App., *infra*, 67a).

The circuit court used an identical analysis in assessing the validity of the Cap Provision. Ignoring the fact that the exception to the annual limit is available only for Alabama waste, the court stated that "[t]he Cap provision applies equally to in-state and out-of-state waste." App., *infra*, 72a. Accordingly, it again applied the *Pike* balancing test and upheld the provision.

The Alabama Supreme Court affirmed the circuit court's decision—and adopted its opinion—with respect to the Base Fee and Cap Provision. See App., *infra*, 17a-37a. However, it reversed the circuit court's ruling that the

Additional Fee is unconstitutional. According to the state supreme court, this Court's decisions "make a distinction between state measures that discriminate arbitrarily against out-of-state commerce in order to give in-state interests a commercial advantage, i.e., simple economic protectionism, and state measures that seek to protect public health or safety or the environment." *Id.* at 41a. The court found that the Additional Fee differed from the facially discriminatory bans on out-of-state waste invalidated in *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), and *NSWMA* because it "has not been enacted for the purpose of economic protectionism." *Id.* at 44a. Based on the asserted inapplicability of those decisions, the court determined that the Additional Fee

> serves these legitimate local purposes that cannot be adequately served by reasonable nondiscriminatory alternatives: (1) protection of the health and safety of the citizens of Alabama from toxic substances; (2) conservation of the environment and the state's natural resources; (3) provision for compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama; (4) reduction of the overall flow of wastes traveling on the state's highways, which flow creates a great risk to the health and safety of the state's citizens.

Ibid.

The state supreme court concluded that "[t]here is nothing in the Commerce Clause that compels the State of Alabama to yield its total capacity for hazardous waste disposal to other states. To tax Alabama-generated hazardous waste at the same rate as out-of-state waste is not an available nondiscriminatory alternative, because Alabama is bearing a grossly disproportionate share of the burdens of hazardous waste disposal for the entire country." App., *infra*, 45a-46a.[4]

---

[4] Justice Houston concurred in the judgment, concluding that hazardous waste should not be treated as an article of commerce protected by the Commerce Clause. App., *infra*, 48a-49a.

REASONS FOR GRANTING THE PETITION

The Framers of our Constitution sought to avoid the commercial rivalries among states that festered under the Articles of Confederation by mandating economic as well as political union. The Framers recognized that the states were in fact economically interdependent and that the Nation would therefore be strongest without artificial barriers obstructing commerce among the states. The Commerce Clause fosters this ideal by prohibiting the states from discriminating in favor of their own goods and against those originating in other states and from seeking to reserve privately-owned resources for their own citizens.

The statutory provisions at issue here, and the Alabama Supreme Court's decision upholding them, comprise nothing less than a frontal assault on these basic Commerce Clause principles. The notion that Alabama may in effect erect an "interstate waste keep out" sign at the Emelle facility, and reserve CWM's waste disposal capacity solely for Alabamians, reflects the very focus on parochial state interests—rather than national interests—that the Framers sought to eradicate. This Court should grant the petition for certiorari to correct the erroneous decision of the court below and to ensure that the Commerce Clause continues to serve its intended function.

I. THE ALABAMA SUPREME COURT'S DECISION UPHOLDING THE FACIALLY DISCRIMINATORY $72 ADDITIONAL FEE CONFLICTS WITH THIS COURT'S PRECEDENTS ON A QUESTION OF GREAT IMPORTANCE.

The decision below upholding the facially discriminatory $72 tax on interstate waste rests on a clear misapplication of this Court's decision in *City of Philadelphia* v. *New Jersey*, *supra*, which held that a state may not discriminate against waste solely on the basis of its origin. Indeed, the Alabama Supreme Court's conclusion that the strictures of the Commerce Clause do not apply if a state legislature acts for noneconomic reasons was

expressly rejected in *City of Philadelphia* itself. And other lower courts have consistently applied the *City of Philadelphia* rule regardless of the subjective motivation underlying the facially discriminatory statute. This Court should grant review to resolve the conflict among the lower courts and correct the Alabama Supreme Court's error regarding this question of substantial public importance.

A. This Court's Decisions Make Clear That The $72 Tax Violates The Commerce Clause.

Well-established principles govern analysis under the Commerce Clause of a state law that discriminates on its face against interstate commerce. Facial discrimination against interstate commerce "by itself may be a fatal defect, regardless of the State's purpose." *Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979). To the extent facial discrimination is not *per se* unconstitutional, the state's burden of justification is "high": the discriminatory statute must be invalidated unless the state can show that the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co.* v. *Limbach*, 486 U.S. 269, 278 (1988). A court must engage in "the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory motives." *Hughes*, 441 U.S. at 337.

This Court has applied this standard in the precise context presented here—a statute that discriminates on its face against waste generated in other states. In *City of Philadelphia*, the Court held invalid under the Commerce Clause a New Jersey statute that barred the disposal within that state of waste generated in other states while permitting disposal of New Jersey waste. The Court explained that the Commerce Clause prevented New Jersey from "discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." 437 U.S. at 626-627.

The Court stated that "[t]he harms caused by waste are said to arise after its disposal in landfill sites, and at that point, as New Jersey concedes, there is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the other. Yet New Jersey has banned the former while leaving its landfill sites open to the latter." 437 U.S. at 629. The statute thus was "an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites. That legislative effort is clearly impermissible under the Commerce Clause." *Ibid.*

The $72 Additional Fee is indistinguishable from the statute held invalid in *City of Philadelphia*: it discriminates against out-of-state waste precisely because of the waste's state of origin. There can be no dispute that the purpose and effect of the Additional Fee are to discourage the disposal within Alabama of waste generated in other states, while exempting from that burden waste generated within Alabama. That is precisely what *City of Philadelphia* forbids.

The Alabama Supreme Court refused to apply *City of Philadelphia*'s anti-discrimination principle to the Additional Fee. It reasoned: "*City of Philadelphia v. New Jersey* does not hold that a state may not limit importation of wastes to protect health and the environment; it holds that a state may not do so for 'simple economic protectionism.'" App., *infra*, 42a.

This Court's decisions, however, expressly and conclusively reject the Alabama Supreme Court's "distinction" based on subjective legislative motivation. For example, in *City of Philadelphia* itself, New Jersey "den[ied] that [its statute] was motivated by financial concerns or economic protectionism" and contended that it was designed "'to protect the health, safety and welfare of the citizenry at large.'" 437 U.S. at 626 (citation omitted). The Court found New Jersey's actual motive irrelevant, stating:

> [I]t does not matter whether the ultimate aim of [the statute] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. * * * But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.

Id. at 626-627. The Court has reiterated this point on several occasions. See, *e.g.*, *New Energy*, 486 U.S. at 279 n.3 (even if state legislature was motivated by a subjective purpose to protect public health, that purpose was "inadequate to validate patent discrimination against interstate commerce"); *Maine* v. *Taylor*, 477 U.S. 131, 148-149 n.19 (1986) (the *City of Philadelphia* standard applies "not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade").[5] Thus, the decision below simply cannot be reconciled with *City of Philadelphia*.

The Alabama Supreme Court's unjustifiably narrow understanding of *City of Philadelphia*'s nondiscrimination principle incurably infects its conclusion (App., *infra*, 44a) that the Additional Fee promotes four legitimate purposes that could not be adequately served through less discriminatory means. To begin with, because the circuit court found (and the state supreme court did not dispute) that "hazardous waste generated in Alabama is just as dangerous as such waste generated in other states" (*id.* at

---

[5] The Alabama Supreme Court stated (App., *infra*, 42a) that *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), supported its reading of *City of Philadelphia*. In fact, that decision reaffirmed *City of Philadelphia*'s conclusion that "[a] court may find that a state law constitutes 'economic protectionism' on proof *either* of discriminatory effect or of discriminatory purpose." 449 U.S. at 471 & n.15 (citation omitted; emphasis added).

86a), the State's health and safety justification plainly can be served as well—if not better—by a nondiscriminatory per-ton tax applicable to *all* waste disposed of within Alabama. *City of Philadelphia*, 437 U.S. at 629; accord *New Energy Co.*, 486 U.S. at 279.[6]

Alabama's goal of conserving landfill space also may be achieved through an even-handed tax on all landfilled waste regardless of origin. See *City of Philadelphia*, 437 U.S. at 627 ("a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders"). Similarly, Alabama's concern about transportation risks can be addressed as well or better by means of a nondiscriminatory tax on the transportation of hazardous materials on Alabama roads. See *American Trucking Ass'ns, Inc.* v. *Secretary of State*, 1991 Me. Lexis 148 (Me. June 17, 1991); *Illinois* v. *General Electric Co.*, 683 F.2d 206, 214 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983).

Finally, it is undisputed that any costs and burdens that Alabama might be forced to incur some time in the fu-

[6]The court below relied (App., *infra*, 43a-44a) on *Maine* v. *Taylor*, *supra*, which involved a Maine statute that banned the importation of out-of-state baitfish. This Court measured the constitutionality of the statute under the strict scrutiny standard applicable to laws that discriminate against interstate commerce. It upheld the statute only because Maine had "legitimate reasons, 'apart from their origin, to treat [out-of-state baitfish] differently.'" *Id.* at 152 (quoting *City of Philadelphia*, 437 U.S. at 627). The out-of-state baitfish had a physical characteristic—the presence of a parasite—that was "not common to wild fish in Maine" and, in addition, shipments of out-of-state baitfish could include non-Maine species that "could disturb Maine's aquatic ecology to an unpredictable extent." 477 U.S. at 141. The State proved that no measure short of a complete ban would allow the State effectively to protect its delicate ecological balance. *Taylor* thus rested squarely on this Court's determination that the record in that case established that out-of-state baitfish were in fact different from and posed a substantially different threat to the environment than in-state baitfish. *Taylor* is inapplicable here because there is no such difference between a ton of Alabama waste and a ton of waste generated in other states.

ture as a result of a ton of hazardous waste that is disposed of today will not vary depending on the waste's state of origin. See Tr. 364 (testimony of ADEM official Sue Robertson). Accordingly, the State's desire to provide a financial safeguard against the assertedly uncertain future costs and burdens associated with the present disposal of hazardous waste—to the extent such a safeguard is necessary or even appropriate given the federal protections already in place (see pages 2-5, *supra*)—plainly can be satisfied through nondiscriminatory taxation or regulation of all hazardous waste disposed of in Alabama.[7]

In sum, the unconstitutionality of the Additional Fee is clear under this Court's settled Commerce Clause jurisprudence.

B. The Decision Below Squarely Conflicts With Those Of Other Lower Courts Invalidating Statutes That Facially Discriminate Against Out-of-State Waste.

The Alabama Supreme Court's decision creates a square conflict among the lower courts concerning the constitutionality of state statutes that facially discriminate against waste generated out-of-state. Prior to the decision below, four federal courts of appeals, relying on *City of Philadelphia*, had held such statutes invalid under the Commerce Clause. See *NSWMA*, *supra*; *Washington State Building & Construction Trades Council* v. *Spellman*, 684

[7]In fact, the Additional Fee does not provide a safeguard of any kind because the revenues are not set aside in an environmental emergency fund, but instead are "deposited into the general budgetary fund of the state to be used for general operations * * *." Ala. Code § 22-30B-3.

Moreover, to the extent the court below believed that the Additional Fee compensated for other taxes paid by in-state generators of hazardous waste, it erred by failing to analyze the fee under the "compensatory tax" doctrine. This Court has made clear that the doctrine applies only if the tax on interstate activity merely counterbalances a "substantially equivalent" tax on intrastate activity. See, *e.g.*, *Maryland* v. *Louisiana*, 451 U.S. 725, 759 (1981). Alabama never has identified a tax that falls exclusively on in-state waste and is "substantially equivalent" to the Additional Fee.

F.2d 627 (9th Cir. 1982), cert. denied, 461 U.S. 913 (1983); *General Electric Co.*, 683 F.2d at 213-214; *Hardage* v. *Atkins*, 582 F.2d 1264, 1266 (10th Cir. 1978).[8]

The reasoning employed by the Alabama Supreme Court is directly contrary to these decisions. For example, the Eleventh Circuit concluded in *NSWMA* that absent proof that out-of-state waste differs from waste generated in Alabama "on the basis of type of waste or degree of dangerousness," Alabama could not subject out-of-state waste to stricter regulation. 910 F.2d at 721. See also *Spellman*, 684 F.2d at 631 ("[t]he State of Washington neglects to address * * * the manner in which local waste, transported and stored within Washington has superior safety and environmental virtues over waste produced elsewhere and similarly controlled by state regulatory measures"). The circuit court applied the same standard in the present case. App., *infra*, 85a-86a. The Alabama Supreme Court, on the other hand, upheld the facially discriminatory statute even though it did not dispute the circuit court's finding that there was no qualitative distinction between waste generated within Alabama and waste generated in other states.

Moreover, these federal courts have applied *City of Philadelphia* without regard to subjective motivation underlying the discriminatory statute. Indeed, the Eleventh Circuit expressly concluded in *NSWMA* that the statute there at issue was an "honorable and well intentioned" attempt to "com[e] to grips with environmental problems" (910 F.2d at 725), but nonetheless struck it down

[8] A number of federal district courts have reached the same conclusion. See *Chemical Waste Management, Inc.* v. *Templet*, 1991 U.S. Dist. Lexis 9492 (M.D. La. July 9, 1991); *National Solid Waste Management Ass'n* v. *Voinovich*, 763 F. Supp. 244 (S.D. Ohio 1991), appeal pending, No. 91-3466 (6th Cir.); *Hazardous Waste Treatment Council* v. *South Carolina*, 32 E.R.C. 1646 (D.S.C. 1991), appeal pending, No. 91-2317 (4th Cir.); *Government Suppliers Consolidating Servs.* v. *Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990); *Industrial Maintenance Serv.* v. *Moore*, 677 F. Supp. 436 (S.D. W. Va. 1987).

under *City of Philadelphia*. *Id.* at 721.[9] Accord *General Electric Co.*, 683 F.2d at 213. The Alabama Supreme Court's decision thus conflicts with the cited court of appeals decisions in approach as well as in result.

The conflict between the Alabama Supreme Court and the Eleventh Circuit is particularly unacceptable because of the effects of the Tax Injunction Act, 28 U.S.C. § 1341, which requires that most challenges to tax statutes be brought in state court. As a result of the Alabama Supreme Court's anomalous decision, one Commerce Clause standard will apply to Alabama's non-tax measures, which may be challenged in federal court, while a conflicting rule will apply to discriminatory Alabama taxes, which may be challenged only in state court. The Court should grant certiorari to eliminate this double standard.

Finally, review is warranted because this issue arises with considerable frequency. A number of states have adopted laws and regulations that facially discriminate against interstate commerce in waste; Commerce Clause challenges are currently pending against the laws and regulations of six such states. *National Solid Waste Management Ass'n* v. *Voinovich*, *supra*; *Hazardous Waste Treatment Council* v. *South Carolina*, *supra*; *National Solid Wastes Management Ass'n* v. *Jorling*, Civ-90-1288A (W.D.N.Y.); *Empire Sanitary Landfill, Inc.* v. *Pennsylvania*, No. 90-187-W (Pa. Envtl. Hearing Bd.); *Gilliam County* v. *Department of Environmental Quality*, No. A68441 (Or. Ct. App.). The decision below could affect the resolution of these cases and might prompt additional states to enact discriminatory barriers to the interstate

[9] The Alabama Supreme Court suggested (App., *infra*, 40a-41a) that the Eleventh Circuit's decision was distinguishable because the Additional Fee "has specifically been found by the legislature to be an effective way to deal with health and environmental hazards to Alabamians created by hazardous waste imported here from other states." In fact, however, the legislative findings accompanying the statute invalidated by the Eleventh Circuit clearly reflect the very same concerns that motivated Act No. 90-326. See Alabama Act No. 89-788, Section 1(9)-1(14).

movement of waste. This Court should grant certiorari and reaffirm that the Commerce Clause prohibits this kind of discriminatory legislation.

II. THE ALABAMA SUPREME COURT'S DECISION UPHOLDING THE $25.60 BASE FEE CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS ON RECURRING ISSUES CENTRAL TO THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE.

Alabama did not rely solely on express discrimination against interstate commerce to achieve its goal of obstructing the disposal of out-of-state waste in Alabama. The $25.60 per ton Base Fee—though facially neutral—also furthers the State's discriminatory plan.

The Base Fee applies only to waste disposed of at "commercial" hazardous waste disposal facilities; it exempts waste disposed of at all other facilities—*i.e.*, facilities that dispose of waste generated on site or that do not charge a disposal fee. It is undisputed that essentially all out-of-state hazardous waste shipped to Alabama for disposal is disposed of at a commercial hazardous waste disposal facility (principally the Emelle facility) and therefore is subject to the Base Fee. At the same time, virtually all of the hazardous waste that is disposed of at other disposal facilities—and hence is exempt from the Base Fee—is generated within Alabama. This exempt waste makes up most of the Alabama-generated hazardous waste disposed of within the State. See page 5 & n.2, *supra*.

By carving out a substantial exemption from the tax that, as a practical matter, is available only to Alabama-generated waste, Alabama has succeeded in applying the tax to virtually *all* interstate waste disposed of within the State, but to only a small percentage of Alabama-generated waste. The use of "commercial" as a proxy for "out-of-state" thus ensures that the economic burden of the tax is borne disproportionately by interstate commerce.

Certainly there is nothing inherent in the nature of a waste disposal tax that justifies the distinction that Alabama has drawn. Act No. 90-326 taxes "disposal," which it defines broadly as:

> [t]he discharge, deposit, injection, dumping, spilling, incineration, leaking or placing of any waste or substance into or on any land or water so that such waste or substance or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters including groundwaters * * *.

Ala. Code § 22-30B-1(2). This definition encompasses the landfilling of hazardous waste, as well as certain forms of treatment or storage—*e.g.*, methods utilizing surface impoundments or waste piles. The definition thus recognizes that it is the character of the waste and the means by which it is disposed of, treated, or stored—not the type of facility at which these management activities take place—that is relevant to the State's putative health and safety purposes. Those purposes would be implicated equally by every single ton of hazardous waste "discharge[d], deposit[ed] * * * or plac[ed]" on land or water in Alabama regardless of whether the facility doing so is "commercial."[10] Targeting "commercial" facilities alone serves no purpose other than conferring an advantage on politically powerful in-state generators of hazardous waste.[11]

---

[10] Indeed, witnesses for both sides testified that the Emelle facility is better designed, and generally *less* likely to cause harm to public health or the environment, than the facilities not covered by the tax. Tr. 396 (Robertson); Henson Dep. 66; Brumond Dep. 279-281.

[11] The Alabama Supreme Court, in rejecting CWM's equal protection challenge to the Base Fee, offered several justifications for the distinction between "commercial" facilities and other facilities. Principally, it asserted that the distinction is justified by the risk inherent in the transportation of waste. App. *infra*, 23a-24a. But the tax does not single out waste that is transported in Alabama: waste generated on-site at the Emelle facility is taxed even though it is *not* transported, while waste transported for disposal at other

This is not the first time that a case has reached this Court involving a state statute crafted on the basis of industry characteristics that serve as proxies for distinguishing interstate commerce from intrastate commerce. In *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990), Florida had first enacted a tax statute expressly exempting beverages made from "Florida-grown" crops. After this Court struck down a similar statute in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), the State substituted a law that deleted the references to "Florida-grown" and "replaced them with special rate reductions for certain specified citrus, grape, and sugarcane products, all of which are commonly grown in Florida and used in alcoholic beverages produced there." 110 S. Ct. at 2243 (footnote omitted). The statute no longer facially discriminated against interstate commerce, but—because the specified beverages were produced disproportionately within Florida and therefore served as a proxy for intrastate commerce—it discriminated just as effectively against interstate commerce in its practical operation. The Florida Supreme Court held that the statute therefore violated the Commerce Clause. That holding was not disputed before this Court, which observed that the Florida Supreme Court's decision "rested on established principles of Commerce Clause jurisprudence." *Id.* at 2247 n.15.

---

facilities is not taxed (as long as no disposal fee is charged). The court also stated (*ibid.*) that commercial facilities pose special problems because they accumulate greater amounts of waste than other facilities. Yet a *per-ton* tax on waste already takes this asserted fact fully into account. Finally, the court observed (*id.* at 24a) that the State need not treat commercial and noncommercial activities the same for tax purposes. While that observation may be true as a general matter, it is irrelevant where the taxed activity is *disposal*, not sales. In any event, even if any of the court's justifications for the State's distinction suffices to meet the lenient rational basis test applied under the Equal Protection Clause, all plainly fall far short of justifying discrimination against interstate commerce.

The Base Fee has a discriminatory effect that is indistinguishable from that of the statute struck down in *McKesson*. The Alabama Supreme Court's decision upholding the Base Fee in spite of that effect thus conflicts with *McKesson* (as well as the decisions of several other state and federal courts) and diverges sharply from this Court's precedents. Review of that decision is plainly warranted.

A. The Base Fee Discriminates Against Interstate Commerce In Violation Of The Commerce Clause.

1. This Court has made clear on numerous occasions that a state law must be assessed under the strict standard applicable to facially discriminatory statutes if it discriminates against interstate commerce in its practical operation. See, *e.g.*, *Amerada Hess Corp.* v. *Director, Division of Taxation*, 490 U.S. 66, 75, 76 (1989); *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 286 (1987); *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350-353 (1977); *Nippert* v. *City of Richmond*, 327 U.S. 416, 431 (1946); *Best & Co.* v. *Maxwell*, 311 U.S. 454, 456 (1940). The fact that the law might be facially neutral is not dispositive of the constitutional inquiry because "[t]he commerce clause forbids discrimination, whether forthright or ingenious." *Best & Co.*, 311 U.S. at 455.

Thus, the Court has condemned facially neutral statutes that effect "ingenious" discrimination in a multitude of contexts. For example, it repeatedly has struck down facially neutral taxes on persons soliciting orders for merchandise. Such taxes, as a practical matter, fall more heavily on out-of-state businesses, which, unlike their local competitors, may find it economically infeasible to maintain a regular retail outlet in the taxing jurisdiction and therefore have to employ solicitors to reach customers there. See, *e.g.*, *Nippert*, *supra*; *Robbins* v. *Shelby County Taxing Dist.*, 120 U.S. 489 (1887). The Court also has invalidated flat truck taxes because the effect of such taxes is to impose a heavier per-mile cost on trucks

engaged in interstate operations than on trucks engaged in intrastate operations. See *Scheiner*, 483 U.S. at 284-286. And it has struck down a requirement that apples bear the applicable federal grade rather than a state grade because the effect of that requirement was to eliminate the competitive advantage enjoyed by producers of apples from other states with stricter grading systems. *Hunt*, 432 U.S. at 351-352.

As we have discussed (see page 18, *supra*), the Base Fee is gerrymandered to reach virtually all interstate commerce, while exempting as much intrastate commerce as possible. That discriminatory effect requires that the constitutionality of the Base Fee be determined under the strict scrutiny test.

Any doubt about the necessity of strict scrutiny review here is eliminated by the strong evidence of the State's discriminatory intent. As the Third Circuit has observed, it may sometimes be difficult to determine whether a facially neutral statute that imposes disproportionate burdens on interstate commerce should be analyzed under the strict scrutiny test or the *Pike* balancing test. Where there is evidence of discriminatory motive *and* discriminatory effect, however, there can be no doubt that strict scrutiny is warranted. *Norfolk Southern Corp.* v. *Oberly*, 822 F.2d 388, 400-401 & n.18 (3d Cir. 1987). In *Hunt*, for example, this Court discussed evidence of the State's discriminatory motive to bolster its conclusion that the statute discriminated in effect against interstate commerce (432 U.S. at 352).[12]

Here, there is abundant evidence of discriminatory intent. The entire purpose of Act No. 90-326 was to obstruct interstate commerce in waste. See pages 6-7, *supra*.

[12] Indeed, this Court repeatedly has stated that evidence that a law was motivated by an intent to discriminate against interstate commerce is *by itself* sufficient to trigger strict scrutiny under the Commerce Clause. See, *e.g.*, *Amerada Hess*, 490 U.S. at 75, 76; *Bacchus Imports*, 468 U.S. at 270; *Clover Leaf Creamery*, 449 U.S. at 471 n.15.

In view of the clear evidence of both discriminatory effect and discriminatory intent, there can be no doubt that the Base Fee discriminates against interstate commerce in violation of the Commerce Clause.[13]

2. The Alabama Supreme Court's contrary conclusion rests on a misunderstanding of this Court's precedents. The Alabama court stated that CWM had failed to establish a discriminatory effect because "[t]he mere fact * * * that most of its customers are out-of-state generators does not establish discrimination against interstate commerce." App., *infra*, 19a (citing *CTS Corp.* v. *Dynamics Corp. of America*, 481 U.S. 69 (1987); *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981); and *Exxon Corp.* v. *Maryland*, 437 U.S. 117 (1978)). But we rely on more than the identity of our customers. We contended below and argue before this Court that the Base Fee has a discriminatory effect because it was carefully drafted to include virtually all interstate hazardous waste disposed of within Alabama and exclude virtually all Alabama hazardous waste. The express exemption of noncommercial hazardous waste facilities thus has the practical effect of shifting a disproportionate tax burden to interstate commerce.

Certainly the cases cited by the Alabama Supreme Court do not support its refusal to apply strict scrutiny. In *Commonwealth Edison*, the challenged coal severance tax applied evenhandedly to *all* coal mined in Montana, regardless of the coal's ultimate destination; coal mined for use in-state was not exempted from the tax. Out-of-state users thus bore the burden of the tax in exact proportion to the amount of coal they used. Accordingly, this Court held, "there [was] no real discrimination" requiring application of strict scrutiny. 453 U.S. at 619.

[13] For the reasons discussed above in connection with the Additional Fee, the Base Fee does not further a legitimate purpose that cannot be served adequately by nondiscriminatory means. The State could accomplish its purposes through an across-the-board per-ton tax on all hazardous waste disposed of or transported in Alabama.

See also *CTS Corp.*, 481 U.S. at 87 (Indiana's facially neutral anti-takeover statute did not discriminate against interstate commerce in its practical operation because it "ha[d] the same effects on tender offers whether or not the offeror [was] a domiciliary or resident of Indiana").[14]

If the Base Fee applied to *all* hazardous waste disposed of in Alabama and if CWM's claim merely were that most hazardous waste disposed of in Alabama (and hence subject to the fee) is from out of state, this case would be similar to *CTS* and *Commonwealth Edison*. But the Base Fee does not apply to *all* hazardous waste disposed of in Alabama; instead it has been carefully drawn to apply only to waste disposed of at *commercial* hazardous waste disposal facilities, with the result that, as a practical matter, it applies almost exclusively to out-of-state waste. Surely if Montana had exempted "noncommercial" coal mines from the severance tax and if it turned out that virtually all of the coal from such mines was used within Montana, the Court would have found that the severance tax discriminated against interstate commerce in its practical effect.

Indeed, under the Alabama Supreme Court's apparent view that statutory exemptions are irrelevant in determining whether a tax discriminates against interstate commerce in its practical effect, the statute in *McKesson* should have been upheld on the ground that it taxed all alcoholic beverages other than those few categories exempted in the statute. The fact that all of the exempt beverages were produced in Florida would have been irrelevant. That narrow view of discrimination against interstate commerce flies in the face of this Court's precedents.

[14] *Exxon Corp., supra*, is even less apposite. That case involved a Maryland statute that barred petroleum refiners and producers from operating retail service stations within the state. The plaintiffs argued that the statute discriminated against interstate commerce because there were no Maryland-based refiners or producers. The Court rejected the argument, reasoning that while the statute prevented some interstate companies—*i.e.*, the refiners and producers—from operating service stations, it did not bar other interstate companies—those not engaged in refining and producing—from participating in the Maryland retail market. Because the statute did not discriminate against all interstate operators—it did not apply to the "several major interstate marketers of petroleum that own and operate their own retail gasoline stations [in Maryland]"—the statute did not discriminate in its practical operation. 437 U.S. at 125-126. Here, by contrast, Alabama has imposed the Base Fee on virtually all out-of-state waste, while exempting a large percentage of in-state waste.

B. The Decision Below Exacerbates The Conflict Among The Lower Courts Regarding The Circumstances In Which The Strict Scrutiny Test Should Be Applied To Facially Neutral State Laws.

The issue presented by the Alabama Supreme Court's decision regarding the Base Fee—when should a facially neutral statute be held to discriminate against interstate commerce—is an important question on which the lower courts are in conflict. This Court should grant certiorari to provide guidance regarding this issue.

To begin with, the role of evidence of discriminatory motive is a matter urgently requiring clarification. Such evidence has been held relevant in shedding light on the practical effect of a facially neutral statute. *Continental Illinois Corp.* v. *Lewis*, 827 F.2d 1517, 1521-1523 (11th Cir. 1987), vacated as moot, 110 S. Ct. 1249 (1990); *Oberly*, 822 F.2d at 400-401 n.18.[15] The Alabama Supreme Court has now taken the diametrically opposite view, holding such evidence "irrelevant." App., *infra*, 19a-20a n.2.

The role of intent evidence is of course an issue that can arise in every Commerce Clause case and, for that reason, clear guidance for the lower courts is essential. This Court heard argument on the proper role of such evidence in *Lewis* v. *Continental Bank Corp.*, 110 S. Ct. 1249 (1990), but did not reach the question because subsequent federal legislation rendered the case moot. This case represents an opportunity to resolve that important issue.

[15] This Court has even stated that evidence of such a motive by itself triggers strict scrutiny review. See page 22 n.12, *supra*.

Second, the decision below exacerbates a conflict regarding the standards for ascertaining whether a facially neutral statute discriminates against interstate commerce in its practical effect. Several lower courts have followed this Court's lead and invalidated facially neutral statutes structured so as to impose a disproportionate burden on interstate commerce. For example, the Ohio Supreme Court applied this rationale to strike down a coal use tax whose rate varied inversely with the sulphur content of the coal. Finding that virtually all Ohio coal had a high sulphur content, while a significant amount of coal from nearby states had a low sulphur content, the Ohio Supreme Court concluded that the tax scheme discriminated against out-of-state coal in its practical operation. *Dayton Power & Light Co.* v. *Lindley*, 58 Ohio St. 2d 465, 391 N.E.2d 716 (1979).

The Florida Supreme Court utilized the same approach in *McKesson*, striking down the facially neutral liquor tax because, as noted above (at 20), it contained an exemption that disproportionately benefitted in-state products at the expense of out-of-state products. *Division of Alcoholic Beverages & Tobacco* v. *McKesson Corp.*, 524 So. 2d 1000, 1008 (Fla. 1988), rev'd as to other issues, 110 S. Ct. 2238 (1990). See also *Continental Illinois Corp.*, 827 F.2d at 1522 (invalidating a Florida law banning new industrial savings banks because the effect of that law was to foreclose the only means that out-of-state bank holding companies had to compete for Florida deposits without disturbing the alternatives that were available only to in-state bank holding companies); *Opinion of the Justices*, 379 A.2d 782, 789 (N.H. 1977) (explaining, in an advisory opinion on the constitutionality of a proposed tax on operators of oil terminal facilities with storage capacities in excess of 500 barrels, that "[t]he line drawn at 500 barrels might have the effect of discriminating against interstate commerce if that line differentiates domestic from foreign corporations").

In contrast, the Colorado Supreme Court, like the Alabama Supreme Court, has refused to apply strict scru-

tiny notwithstanding a showing that the statute at issue disproportionately benefitted intrastate commerce. See *Archer Daniels Midland Co.* v. *State*, 690 P.2d 177 (Colo. 1984). At issue in *Archer Daniels* was a 5¢ per gallon sales tax reduction for gasohol that was available only for gasohol produced at facilities with an annual production capacity of 17 million gallons or less. The record reflected that *no* Colorado producer had an annual production capacity of over 17 million gallons, whereas over 75% of the national market was excluded by the capacity limitation. *Id.* at 192 (Lohr, J., dissenting). Despite this severely disproportionate impact, the closely-divided Colorado Supreme Court upheld the tax reduction provision under the *Pike* balancing test. The court's decision conflicts with the other decisions cited above. Indeed, the Florida Supreme Court expressly refused to follow it in *McKesson*. See 524 So. 2d at 1007.

In sum, the lower courts are plainly in need of guidance in determining when to apply strict scrutiny to facially neutral statutes. This Court should grant certiorari to address that question.

III. THE ALABAMA SUPREME COURT'S DECISION UPHOLDING THE CAP PROVISION ALSO WARRANTS REVIEW BY THIS COURT.

The Alabama Supreme Court refused to subject the Cap Provision to strict scrutiny, stating: "Tonnage restrictions which apply equally to all waste, regardless of origin, do not violate the Commerce Clause." App., *infra*, 26a. The court's conclusion that the Cap Provision does not discriminate against interstate commerce—and its ultimate decision upholding that provision—are tied to its decisions upholding the Additional Fee and Base Fee and merit review for much the same reasons.

To begin with, invalidation of either of the taxes on Commerce Clause grounds would necessitate invalidation of the Cap Provision. See App., *infra*, 92a-93a (trial court decision). The cap would be tainted because the amount was fixed at a time when the disposal volume was severely and improperly depressed by the illegal taxes.

The cap itself also independently discriminates against interstate commerce. To begin with, the Alabama Supreme Court's basic premise—that the Cap Provision is facially neutral—is plainly wrong. The provision contains an exception that permits disposal of additional waste if necessary either to protect human health or the environment *in the State* or to meet *Alabama's* federal obligation to assure sufficient capacity to dispose of *Alabama-generated* waste. By its very terms, therefore, this condition can be satisfied only if there is a need to dispose of Alabama-generated waste. Thus, through this facially discriminatory exception, the State has ensured that the comparatively small percentage of in-state waste disposed of at the Emelle facility never actually will be subject to the annual limit that out-of-state waste must face.

Like the Base Fee, moreover, the Cap Provision applies only to "commercial" disposal facilities and therefore discriminates against interstate commerce in its practical effect. By imposing the cap only on commercial hazardous waste facilities that disposed of over 100,000 tons of hazardous waste from July 15, 1990 through July 14, 1991, the State artfully has ensured that the annual limit will apply *only* to the Emelle facility. Because the Emelle facility disposes of virtually all of the hazardous waste that is brought to Alabama from other states, the annual limit will serve to limit the amount of out-of-state waste that can be disposed of at the Emelle facility in any one year, while allowing the overwhelming majority of in-state waste—the waste that is disposed of at other facilities—to escape any limit whatever.

The record also contains considerable evidence that the Cap Provision, like Act No. 90-326 as a whole, was motivated by an intent to discourage the disposal of out-of-state waste in Alabama. For example, when Governor Hunt signed Act No. 90-326 into law, he stated: "An important provision in this bill will cap the amount of hazardous waste that can be dumped in Alabama at whatever amount is brought to the state over the next 12 months." Pl. Exh. 80. See also Pegues Dep. 50-51,

61-62. As explained with regard to the Base Fee (at 22), this supports the conclusion that the Cap Provision is unconstitutionally discriminatory.

IV. THE QUESTIONS PRESENTED HAVE CONSIDERABLE PRACTICAL SIGNIFICANCE.

The constitutionality under the Commerce Clause of state laws that discriminate against out-of-state waste is a question of tremendous practical importance. CWM's payments for the first year the two fees have been in effect totaled approximately $34 million. And the discriminatory burdens on interstate commerce have diverted a substantial amount of interstate commerce away from the Emelle facility and Alabama. The volume of waste disposed of at CWM's Emelle facility has dropped by *more than 50%* in the year since Act No. 90-326 took effect. Out-of-state waste accounts for virtually all of the decline. This devastating blow to interstate commerce in general—and to CWM's business in particular—is made permanent by the Cap Provision.

The threat to interstate commerce involves more than just money. The Emelle facility plays a critical role in the safe disposal of the Nation's hazardous waste. As the circuit court found, "Emelle received two years ago approximately 17% of all hazardous wastes commercially landfilled in the United States." App., *infra*, 58a. There are only five commercial hazardous waste landfills east of the Mississippi River, and only two of those are permitted to accept waste containing PCBs. Tr. 170 (testimony of Rodger Henson); 250 (Robertson).[16] Interstate transportation of such waste is therefore unavoidable if the waste is to be disposed of in facilities that comply with the governing federal standards. See, *e.g.*, Tr. 82 (Henson); 215-216 (Robertson).

This is especially true with respect to the considerable amount of waste disposed of at Emelle that has been removed from unsafe disposal sites, as a result of either

[16] At the time of the trial, only one landfill east of the Mississippi River could accept PCBs.

voluntary efforts or cleanups under federal and state "Superfund" programs. Virtually all of that waste comes from outside Alabama. See Tr. 55, 160 (Henson); 210-212 (Robertson). The significant increase in cost resulting from the Additional and Base Fees, and the permanent annual limit effectuated by the Cap Provision, will almost certainly deter cleanup efforts, thus prolonging the grave threat that these unregulated, unsafe sites pose to the public at large. That result will undermine Congress's primary purpose in enacting the Superfund statute: "'the prompt cleanup of hazardous waste sites.'" *J.V. Peters & Co.* v. *Administrator*, 767 F.2d 263, 264 (6th Cir. 1985) (citation omitted). By raising a significant barrier to the disposal of out-of-state waste at the Emelle facility, which provides a significant part of the Nation's overall waste disposal capacity, Act No. 90-326 thwarts the important public goal of safely disposing of this waste.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JAMES T. BANKS
JOHN T. VAN GESSEL
Chemical Waste Management, Inc.
3003 Butterfield Road
Oak Brook, Illinois 60521
(708) 218-1500

DRAYTON PRUITT, JR.
Pruitt, Pruitt & Watkins, P.A.
Courthouse Square
P.O. Box 1037
Livingston, Alabama 35470
(205) 652-9627

ANDREW J. PINCUS *
KENNETH S. GELLER
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0628

FOURNIER J. GALE III
H. THOMAS WELLS, JR.
Maynard, Cooper, Frierson & Gale, P.C.
1901 Sixth Avenue, North
2400 AmSouth/Harbert Plaza
Birmingham, Alabama 35203
(205) 254-1000

Counsel for Petitioners

SEPTEMBER 1991

* *Counsel of Record*

APPENDICES

APPENDIX A

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1991

1901043

GUY HUNT, as Governor of the State of Alabama

v.

CHEMICAL WASTE MANAGEMENT, INC.

1901044

JAMES M. SIZEMORE, JR., as Commissioner of the Alabama Department of Revenue; and the ALABAMA DEPARTMENT OF REVENUE

v.

CHEMICAL WASTE MANAGEMENT, INC.

1901106

CHEMICAL WASTE MANAGEMENT, INC.

v.

THE ALABAMA DEPARTMENT OF REVENUE, *et al.*

Appeals from Montgomery Circuit Court

(CV-90-1098)

SHORES, JUSTICE.

In April 1990, the Alabama Legislature enacted Act No. 90-326 (the "Act"), effective July 15, 1990, *Code of Ala.* 1975, § 22-30B-1 et seq. (Supp. 1990), which was signed into law by the Governor. The Act imposes two fees on the disposal of hazardous waste at commercial facilities in Alabama. A "Base Fee" of $25.60 per ton was imposed on all waste and substances disposed of at commercial facilities, regardless of the state of origin. An "Additional Fee" of $72.00 per ton was imposed on all waste and substances generated outside the State of Alabama and disposed of at Alabama facilities.

The Act also included a "Cap" provision, limiting the amount of hazardous waste that can be disposed of at any affected facility in any one-year period. Under the Cap provision, the amount of hazardous waste disposed of during the first year that the Act's new fees are in effect (the "benchmark period"), becomes the permanent ceiling in subsequent years. The Cap provision applies only to commercial facilities that dispose of over 100,000 tons of waste per year. The facility at Emelle, Alabama, is the only facility in this category.

On June 5, 1990, Chemical Waste Management, Inc. ("CWM"), filed suit for declaratory relief against the Alabama Department of Revenue, James N. Sizemore, Jr., as Commissioner, and Guy Hunt as Governor ("the State"). The suit challenged the constitutionality of Act No. 90-326, *Code of Alabama* 1975, § 22-30B-1 et seq. CWM alleged that the provisions of the Act violate the Commerce Clause of the United States Constitution; the Equal Protection Clause of the United States Constitution and its equivalents under the State Constitution; and the Due Process Clause of the State Constitution. CWM further contends that the Act is a "revenue bill" enacted during the last five days of the legislative session in violation of Article IV, § 70, of the Alabama Constitution.

CWM further contends that the Cap provision violates the Commerce, Due Process, and Equal Protection Clauses of the United States Constitution and is preempted by various federal statutes.[1]

CWM also sought a preliminary and permanent injunction enjoining the State from enforcing, applying, or attempting to enforce the Act. Dr. Claude Earl Fox, state health officer, was allowed to intervene on behalf of the State Board of Health.

Governor Hunt filed a counterclaim for declaratory relief, asking that the trial court find and declare the Act constitutional. On February 28, 1991, the trial judge, the Honorable Joseph D. Phelps, declared the Base Fee and Cap provisions of the Act to be valid and constitutional. However, he declared the Additional Fee imposed on out-of-state generated waste to be impermissible and invalid as a violation of the Commerce Clause of the United States Constitution.

The State appeals only that aspect of the trial judge's order pertaining to the Additional Fee. CWM appeals from the trial judge's holding that the Base Fee and Cap are constitutional. We affirm the trial judge's holdings that the Base Fee and Cap provisions of the Act are valid and constitutional. We reverse the holding of the trial judge that the Additional Fee violates the Commerce Clause.

The legislative findings underlying Act No. 90-326, as quoted by the trial judge in his order of February 28, 1991, are as follows:

---

[1] (1) the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*; (2) the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 *et seq.*; (3) the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*

"*Act § 1, Code § 22-30B-1.1 Legislative findings.*

"The Legislature finds that:

"(1) The state is increasingly becoming the nation's final burial ground for the disposal of hazardous wastes and materials;

"(2) The volumes of hazardous wastes and substances disposed in the state have increased dramatically for the past several years;

"(3) The existence of hazardous waste disposal activities in the state poses unique and continuing problems for the state;

"(4) As the site for the ultimate burial of hazardous wastes and substances, the state incurs a permanent risk to the health of its people and the maintenance of its natural resources that is avoided by other states which ship their wastes to Alabama for disposal;

"(5) The state also incurs other substantial costs related to hazardous waste management including the costs of regulation of transportation, spill cleanup and disposal of ever increasing volumes of hazardous wastes and substances;

"(6) Because all waste and substances disposed at commercial sites for the disposal of hazardous waste and hazardous substances, whether or not such waste and substances are herein defined as hazardous, contribute to the continuing problems created for the state, and because state and federal definitions of 'hazardous wastes' have regularly changed and are likely to change in the future to include waste not previously defined as hazardous, it is necessary that all waste and substances disposed of at a commercial site for the disposal of hazardous waste or hazardous substances be included within the requirements of this act;

"(7) The legislature finds that the public policy of the state is to encourage business and industry to develop technology that will eliminate the generation of hazardous waste and substances. . . .

"(8) Since hazardous wastes and substances generated in the state compose a small proportion of those materials disposed of at commercial disposal sites located in the state, present circumstances result in the state's citizens paying a disproportionate share of the costs of regulation of hazardous waste transportation, spill cleanup and commercial disposal facilities. Persons, firms or corporations which generate and dispose of such waste and substances in Alabama presently are among the taxpaying citizens of this state who must bear the burden of regulation, inspection, control and clean-up of hazardous waste sites; addressing the public health problems created by the presence of such facilities in the state; and, preserving this state's environment while those generating this waste in other states and shipping it to Alabama for disposal presently are not. This act attempts to resolve that inequity by requiring all generators of waste being disposed of in Alabama to share in that financial burden.

"(9) The operators of commercial sites for the disposal of hazardous wastes or hazardous substances have the ability to control the flow of said wastes or substances into said sites. Further, said operators, by exercise of said ability to control the flow of wastes or substances disposed at sites during a twelve-month period [need] only to enlarge the amount of wastes disposed during the next twelve-month period by a proportionate amount. The health of the population of this state and the soundness of the environment are and would be threatened by such an exercise of control. Said exercise of control could cause an artificial decrease in fees during the twelve-month period beginning July 15, 1990, and ending

July 14, 1991. To prevent threats to the health of the population of this state and to the soundness of the environment of this state and to prevent an artificial decrease in fees during the twelve-month period beginning July 15, 1990, and ending July 14, 1991, this act provides a cap on the amount of hazardous waste and hazardous substances disposed during the twelve-month period beginning October 1, 1991, said cap being a function of the amount of hazardous waste and hazardous substances disposed during the twelve-month period beginning July 15, 1990, and ending July 14, 1991."

The pertinent provisions of Act No. 90-326 are as follows:

Act § 3(a), Code § 22-30B-2(a) (the Base Fee):

"In addition to other fees levied, there is hereby levied a fee to be paid by the operators of each commercial site for the disposal of hazardous waste, or hazardous substances in the amount of $25.60 per ton for all waste or substances disposed of at such site."

Act § 3(b), Code § 22-30B-2(b) (The Additional Fee):

"For waste and substances which are generated outside of Alabama and disposed of at commercial sites for the disposal of hazardous waste or hazardous substances in Alabama, an additional fee shall be levied at the rate of $72.00 per ton."

Act § 9, Code § 22-30B-2.3 (the Cap Provision):

"Any commercial site for the disposal of hazardous waste or hazardous substances that disposes of in excess of 100,000 tons of hazardous waste or hazardous substances during the twelve-month period beginning July 15, 1990, and ending July 14, 1991, (hereinafter referred to as the benchmark period) shall not, during any twelve-month period beginning October 1, 1991, and any twelve-month period thereafter, dispose of more than the tonnage received during said benchmark period. Such restriction shall be in addition to any other ban or restrictions on disposal imposed by any regulatory authority. Provided, however, that the Governor or the Governor's designee may allow disposal of hazardous wastes or hazardous substances in excess of the tonnage disposed of during the benchmark period if such action is determined by the Governor or the Governor's designee to be necessary to protect human health or the environment in the state, or to allow the state to comply with its obligations to assure disposal capacity pursuant to applicable state or federal law as determined by the Governor or his designee."

Act § 2, Code § 22-30B-1 (Definitions):

"(3) HAZARDOUS SUBSTANCE(S). Any substance defined as a hazardous substance pursuant to 42 U.S.C. § 9601(14), as amended, or listed as a hazardous waste pursuant to the Code of Alabama 1975, Section 22-30-10, as amended.

"(4) HAZARDOUS WASTE(S). Those wastes defined at Section 22-30-3(5), Code of Alabama 1975, as amended, or listed pursuant to Section 22-30-10, Code of Alabama 1975, as amended, or department regulations."

The trial judge made findings of fact in his order of February 28, 1991, which we quote below and approve:

"FINDINGS OF FACT

"1. Based on statements and representations made by the parties during pretrial proceedings, the Court accepts the legislative findings supporting Act No.

90-326. In addition, the Court finds that the evidence at trial adequately supports the legislative findings. The Court further finds that the Base Fee and Cap provisions of Act No. 90-326 which this Court determines and finds to be constitutionally permissible are integral parts of a regulatory procedure which appropriately addresses the concerns expressed by the Alabama Legislature when it enacted the 'Hazardous Wastes Management Act of 1978,' The following statement of Legislative Finding, Purpose and Intent is set forth in this 1978 legislation:

" 'Section 2. Legislative Finding, Purpose and Intent—The Legislature finds that increasing quantities of hazardous wastes are being generated in the State and that without adequate safeguards from the point of generation through handling, processing and final disposition, such wastes can create conditions which threaten human or animal health and the environment. The Legislature, therefore, declares that in order to minimize and control any such hazardous conditions it is in the public interest to establish and to maintain a statewide program to provide for the safe management of hazardous wastes.'

"Acts 1978, 2nd Ex.Sess., No. 129, p. 1843.

"A. *The Emelle Facility*

"2. CWM is a Delaware corporation with its principal place of business in Oak Brook, Illinois. CWM is the owner and operator of one of the nation's oldest and largest commercial hazardous waste land disposal facilities located in Emelle, Alabama (the 'Emelle facility'). The Emelle facility is a hazardous waste treatment, storage, and disposal facility operating pursuant to a permit issued by the Environmental Protection Agency ('EPA') under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* ('RCRA') and the Toxic Substances

Control Act, 15 U.S.C. § 2601 *et seq.* ('TSCA'). In addition, the Emelle facility is authorized to operate under state law pursuant to interim status authority granted under Alabama Code § 22-30-12(i). The Emelle facility is the only commercial hazardous waste landfill facility currently in operation in the State of Alabama.

"3. In a 1973 study, EPA identified 74 potential sites for hazardous waste landfills throughout the country, of which Emelle was one. Although hazardous waste landfills can be designed and engineered to operate in practically every state of the United States, only a very few commercial sites presently exist. Efforts to obtain permits for new sites in other states are resisted by citizens of those states.

"4. According to the testimony presented at trial, only one additional hazardous waste landfill has been permitted in the United States since the effective date of RCRA, November 17, 1980. That facility, in Last Chance, Colorado, has never operated or accepted waste and is presently for sale.

"B. *The Increasing Volumes of Out-of-State Wastes at Emelle*

"5. Increasing amounts of out-of-state hazardous wastes are being shipped to Emelle for permanent storage from in-state generators and from those in states throughout the country. The following tonnage has been received by Emelle in the years indicated:

"1985	341,000 tons
"1986	456,000 tons
"1987	564,000 tons
"1988	549,000 tons
"1989	788,000 tons

"The increase in tonnage has resulted in a significant increase in problems with regard to regulating and supervising the disposal of hazardous waste at Emelle. Eighty-five to ninety percent of the tonnage permanently buried at Emelle is from out-of-state. Emelle received two years ago approximately 17% of all hazardous wastes commercially landfilled in the United States.

"6. CWM estimates there is capacity at Emelle for another 100 years of operation. CWM has admitted that without the restrictions imposed by the Alabama legislature, 'the total annual demand for disposal capacity at the Emelle facility for hazardous waste generated out-of-state is projected to increase annually.' (Paragraph D of Answer of CWM to Defendant Hunt's Counterclaim.)

"7. A portion of the wastes coming to Emelle are classified as non-hazardous. Some of these non-hazardous industrial wastes are sent to the Emelle facility by industries which may be seeking to reduce their own liability should these wastes become classified as hazardous wastes in the future. Additionally, these non-hazardous wastes are commingled with the hazardous wastes that are landfilled at the Emelle facility and therefore for the purposes of long-range monitoring and potential cleanup, must be treated as hazardous waste in any event. EPA, moreover, has made limited progress in identifying hazardous wastes to be regulated and does not know whether it has identified 10% or 90% of existing hazardous wastes. As a result, wastes which today are deemed non-hazardous may very well in the future be deemed hazardous for one reason or another.

"C. *The Permanent Risks and Costs of Hazardous Waste Landfilling*

"8. It is without dispute that the wastes and substances being landfilled at the Emelle facility include substances that are inherently dangerous to human health and safety and to the environment. Such waste consists of ignitable, corrosive, toxic and reactive wastes which contain poisonous and cancer causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death. Should a sudden or non-sudden discharge or release occur, hazardous wastes could pollute the environment, contaminate drinking water supplies, contaminate the ground water, and enter the food chain. Among these are arsenic, mercury, lead, chromium and cyanide. These wastes are generated by an entire spectrum of industry.

"9. Landfilling is the least desirable means of hazardous waste disposal. Many hazardous wastes remain in the environment and do not break down. Although some wastes degrade or can be made less hazardous through treatment, many substances remain hazardous forever.

"10. Although hazardous wastes are now required to be solidified before being placed in a landfill, seepage of groundwater and surface water into closed trenches at Emelle containing liquid or solidified wastes creates a poisonous liquid known as leachate. Scientists are continuing to learn more about leachate and water pressures. As concluded in the August, 1983 report to CWM by Golder Associates, the accumulation of leachate in closed trenches will result in a 'vertical head difference serv[ing] as the driving force which will eventually cause exfiltration of fluid within the landfill trenches outward into the surrounding chalk.' The testimony at trial was that

it appears that leakage has already occurred with respect to at least some of the closed trenches. Leachate is presently pumped only from closed Trench 19 and open Trench 21. It is stored in above ground storage tanks with a capacity of 5 million gallons. From 10 million to 15 million gallons annually of leachate and surface water are gathered, stored and transported from Emelle at a cost of $2 to $3 million.

"11. EPA has found that absolute prevention of migration of hazardous waste through synthetic trench liners is beyond the current technical state of the art, and that some migration will occur. The liners will probably retard migration only for the relatively short-term measured in tens of years. Although it appears that leachate is already seeping into the Selma chalk, it is uncertain how far it has moved and at what rate it will travel. There are widely varying estimates as to travel time. A November, 1987 joint report of the hazardous waste Ground-Water Task Force of EPA and the Alabama Department of Environmental Management ('ADEM') entitled 'Evaluation of Chemical Waste Management, Inc., Emelle, Alabama', stated at page 30 as follows:

> " 'The transit time through the Selma chalk ("to the Eutaw Formation . . . uppermost aquifer") was estimated by CWM to be 10,000 years. Independent EPA estimates of transit time using conservative estimate for equation variable were 330 years and 3,000 years for estimates using Darcy's Equation and a 2-D solute transport model, respectively. . . .'

"Those transit time estimates all involve complicated calculations based upon highly variable factors.

"12. The evidence shows that possibly a more serious concern is the lateral migration of leachate from the trenches following the downward gradient to the drainage areas leading to Bodka Creek, a tributary of the nearby Noxubee and Tombigbee Rivers. Although the closed trenches studied by Golder Associates in an August, 1990 report range from 50 to 150 feet apart, a CWM expert witness testified it would surprise him if there were a migration of fluid from some of the closed trenches to other closed trenches; that there probably is some interconnection between those trench walls; and that fluid could move along the near surface defects in the downgradient direction.

"13. The Selma Group Chalk Formation, in which the Emelle facility is located, extends across the states of Alabama, Mississippi, Arkansas and Texas. Although the chalk generally is of low permeability and is potentially suitable for the geological containment of hazardous wastes, the geologic integrity of the chalk also depends on the permeability of fractures, faults and other discontinuities. Faults and fractures exist throughout the Selma chalk at Emelle through which the leakage of hazardous waste and leachate may be greatly facilitated. Dr. Richard Groshong, a geology professor at the University of Alabama, testified that the faults and fractures may accelerate travel time through the Selma chalk by several orders of magnitude. According to Dr. Groshong, these rates 'are important on a human time scale as opposed to a geological time scale.' Tom Joiner, a former State Geologist, agreed that a 'brittle fault' might speed the migration of leachate through the Selma chalk.

"14. Dr. Groshong testified that there is a further need to identify, map, and study the faults and fractures at the Emelle facility. However, there will

always be uncertainty with respect to the faults and fractures.

"15. To monitor leachate and hazardous waste leakage, CWM has been required to install a large number of monitoring wells at Emelle. Periodic checks of those monitoring wells will be required forever. One CWM witness estimated the present annual costs of that monitoring system is between $100,000 and $200,000. Another CWM official estimated monitoring costs of Emelle to be in excess of $1½ million per year. It is doubtful that monitoring wells can be placed in sufficient locations to monitor all the movement of water as such monitoring may prove to be impractical. Thus, the uncertainty of whether all contamination will be detected will likely remain. Indeed, the existence of monitoring wells creates new conduits for hazardous wastes to reach underlying groundwater.

"16. The Emelle facility is within an earthquake risk zone as designated by the Alabama Emergency Management Agency. There was testimony to the effect that earthquakes pose an uncertain short and long range risk to the Emelle facility. In 1886 an earthquake in Sumter County caused a one-half foot movement in the ground surface. There was evidence that, depending upon its severity, an earthquake could unseal cracks in the chalks and open avenues for the movement of leachate and hazardous wastes.

"D. *Transportation and Spills*

"17. In 1989, approximately 40,000 truckloads of wastes were transported over the public highways to the Emelle facility of which approximately 34,000 to 36,000 were from out of state. As in the operation of the facility, transportation of these wastes, no matter how elaborate the precautions, also creates

unquantifiable risk or uncertainty to the public health and to the environment.

"Some trucks destined for Emelle have been involved in accidents causing hazardous waste to be spilled or released into the environment. Additionally, several incidents of releases of hazardous wastes and noxious fumes have already occurred at the facility. These risks are increased by the increasing volumes. The hazardous wastes landfilled at the Emelle facility are inherently dangerous in their transportation and movement into or from one place to another throughout the State of Alabama. That movement into and through the State of Alabama carries the potential and risk of spills, accidents and explosions that could release toxic fumes and contaminate the groundwater and/or surface water. The increasing volumes have increased the risks and liability involved in that transportation.

"E. *Permanence of Dangers and Financial Risks*

"18. Although it will be necessary to monitor, regulate, maintain (including the pumping, collection, storage, transportation and disposal of leachate from the trenches), and secure the facility forever, CWM has made no provision for the payment of such costs beyond a period of 30 years after closure. Additionally, there has been no provision for the payment of any abatement, corrective, or remediation costs, compliance monitoring, third-party damages or natural resource damage.

"19. Whenever CWM's planned or unplanned cessation of activities at Emelle occurs, there will be substantial financial and environmental risks to the people, businesses, and corporations of Alabama.

"20. Alabama has a legitimate interest in guarding against the various imperfectly understood en-

vironmental risks posed by the storage of large quantities of hazardous wastes in Alabama, as well as the risks which may be more easily identified.

"F. *The Legislative Classifications*

"21. The CWM hazardous waste facility at Emelle currently is the only commercial hazardous waste landfill in Alabama. Of the 788,000 tons of waste landfilled at Emelle during 1989, 68,000 to 69,000 tons were generated in-state, or 8.6% of the 1989 total.

"22. There is only one, relatively small non-commercial hazardous waste landfill facility presently permitted for hazardous waste in Alabama. It is in Washington County, and it accepts only on-site generated hazardous waste of approximately 4000 tons a year.

"23. Closed non-commercial hazardous waste landfills (such as Sanders Lead in Troy) are not comparable to Emelle. They only- accepted on-site generated hazardous waste and are no longer in operation.

"24. Non-commercial hazardous waste facilities are not comparable to commercial hazardous waste facilities. Commercial facilities are likely to involve the transportation of wastes from off-site locations, and the accumulation and disposal of relatively large quantities of hazardous wastes; most non-commercial facilities dispose of wastes on-site, and generally do not involve transportation. The amounts generated and disposed of at non-commercial facilities are far smaller than amounts disposed of at commercial facilities. Accordingly, the public health and safety risks associated with commercial hazardous waste facilities are much greater than those associated with non-commercial facilities.

"25. Incinerators are not comparable to commercial hazardous waste landfills. Incinerators permanently destroy hazardous waste, leaving only a small residue which must be landfilled.

"26. Should additional commercial hazardous waste landfills be permitted in Alabama, and meet the statutory criteria, the provisions of Act 90-326 would apply to them just as they apply now to CWM."

I.

We first consider whether the trial court erred in holding that the Base Fee of Act No. 90-326 is constitutional. CWM contends the trial court erred in finding the Base Fee constitutional and argues that it clearly discriminates against interstate commerce in violation of the Commerce Clause. CWM argues further that the Base Fee violates the Equal Protection Clause, because, it claims, the classifications are not rationally related to a legitimate state interest. CWM finally argues that the Base Fee violates the Due Process Clause.

We do not find CWM's arguments as to this issue to be persuasive. We adopt the conclusions of law stated by Judge Phelps in his order of February 28, 1991, as the decision of this Court as to this issue:

"*The Base Fee*

"(1) *The Commerce Clause Challenge*

"As a threshold matter, the Court concludes that the Base Fee regulates evenhandedly and without regard to origin. The Base Fee effectuates a legitimate local interest. The legisiature found, among other things, that: the volume of hazardous wastes being disposed of in Alabama has increased dramatically; the state incurs a permanent risk to the health of its people and the maintenance of its natural resources; and Alabama incurs substantial eco-

nomic costs related to hazardous waste management such as regulatory costs and spill cleanup. Additionally, the evidence at trial documented specific possible threats to human health and the environment posed by the Emelle facility. Clearly, the state of Alabama has a legitimate interest in imposing fees on commercial hazardous waste facilities to address the serious financial, environmental and other risks they create.

"It is well-settled that states' regulatory powers are greatest when they address traditional matters of local concern such as environmental and natural resource regulation. *Kassel v. Consolidated Freightways*, 450 U.S. 662, 670, 101 S.Ct. 1309, 67 L.Ed.2d 580, 586 (1981). Legislative measures enacted to promote public health and safety are accorded particular deference. *Raymond Motor Transportation, Inc. v. Rise*, 434 U.S. 429, 443, 98 S.Ct. 787, 54 L.Ed.2d 664, 676 (1978). Challenges to state public safety regulations must overcome a 'strong presumption of their validity.' *Id.*, 434 U.S. at 444, 98 S.Ct. at 795, 54 L.Ed.2d at 677. Courts will not second-guess legislative judgments about the importance of safety justifications in comparison with the burdens on interstate commerce. *Kassel*, 450 U.S. at 670, 67 L.Ed.2d at 587. States retain broad authority under their general police powers to regulate matters of legitimate local concern even though interstate commerce is affected. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

"When a police power regulation is challenged under the Commerce Clause, one of two tests is applied. If the regulation is discriminatory on its face or in practical effect, the state must show that (1) the regulation has a legitimate local purpose; (2) the regulation serves this interest; and (3) reasonable nondiscriminatory alternatives, adequate to pre-

serve the legitimate local purpose, are not available. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). This is the 'strict scrutiny' test.

"If no facial discrimination is involved, a 'balancing test' is applied to determine the constitutional validity of statutes:

> " 'Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'

Pike v. Bruce Church, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). If a legitimate local purpose exists, 'the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.' *Id.*

"CWM has failed to establish that the Base Fee has discriminatory effects on interstate commerce. The mere fact, as CWM argues, that most of its customers are out-of-state generators does not establish discrimination against interstate commerce. The United States Supreme Court has stated that even if the burden of a state regulation falls most often on out-of-state companies, this burden 'does not, by itself, establish a claim of discrimination against interstate commerce.' *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987); *see also Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); *Exxon Corp. v. Gov. of Maryland*, 437 U.S. 117, 126 (1978). The strict scrutiny test does not apply in these circumstances.[2]

---

[2] "The Court deems irrelevant any evidence attributing to any state officials any motive of discriminating against interstate

"The Base Fee does not facially discriminate against out-of-state waste. All waste disposed of at Alabama commercial hazardous waste facilities is subject to the $25.60 fee. Consequently the *Pike v. Bruce Church* balancing test will be applied to assess the fee's constitutional validity. In balancing the interests at stake, the Court finds that the burden the Base Fee imposes on interstate commerce is not clearly excessive in relation to the benefits it produces. The fee benefits the state, on the other hand, by compensating it for the financial responsibilities and risks it bears on account of commercial hazardous waste disposal activities. Thus, a comparison of the Base Fee's local benefits to its alleged burden on interstate commerce establishes that any such burden is not clearly excessive. Furthermore, to the extent that the Base Fee does deter hazardous waste landfilling, the fee is a proper instrument of deterrence.[3] Finally, in view of the financial, safety, environmental and other objectives of Act No. 90-326 and the fact that the Base Fee falls evenhandedly on interstate and intrastate waste, it is difficult to imagine how these objectives could be accomplished in ways that have a lesser impact on interstate activities.

"For these reasons, CWM's Commerce Clause challenge to the Base Fee is without merit.

---

commerce. It is well-established that '[i]nquiries into [lawmakers'] motives or purposes are a hazardous matter. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, . . .' *United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S.Ct. 1673, 1682-83, 20 L.Ed.2d 672, 684 (1968), *cited in, CECOS International, Inc. v. Jorling*, 895 F.2d 66, 73 (2d Cir. 1990)."

[3] "Similarly, in the forms which the EPA submits in connection with its waste reduction program, the agency asks states to list measures they are taking to reduce the generation of waste; the EPA lists fees as one example of such measure."

"(2) *The Equal Protection Challenge*

"The Equal Protection Clause of the United States Constitution and similar provisions of the Alabama Constitution prohibit the State of Alabama from denying any person equal protection of the law. There is a 'presumption of constitutionality which can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.' *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364-65 (1973). *See also White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989). 'The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.' *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). Unless the state statute involves a suspect class or a fundamental right, courts generally will not overturn the statute on equal protection grounds 'unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the legislature's actions were irrational.' *Pennell v. San Jose*, 485 U.S. 1, 14 (1988) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). The statute must be 'rationally related to a legitimate state interest.' *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 81, 108 S.Ct. 1645, 100 L.Ed.2d 62, 74 (1988) (quoting *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985)). If the state legislature's determination that its regulation will serve a legitimate public purpose is 'at least debatable,' the challenge to that action must fail. *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938). '[C]ourts are not empowered to second-guess the wisdom of state policies.' *Western & Southern Life Ins. Co. v. Board of Equalization*, 451 U.S. 648, 670 (1981). This 'rational relationship' test is not diffi-

cult to pass. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985). Additionally, state regulations dealing with health, welfare and the economy are entitled to deferential Equal Protection review. *Evergreen Waste Systems, Inc. v. Metropolitan Service District*, 643 F. Supp. 127, 133 (D.Or. 1986) (citing *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)); *Railway Express Agency v. New York*, 336 U.S. 106 (1949)). State tax legislation is given great deference. *White v. Reynolds Metals Co.*, 558 So.2d at 380. States are free to impose taxes on different trades and professions, and may vary the tax rates on different products. *Id.* (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526-27 (1959)). Because the Base Fee provision involves neither a suspect class, such as race, nor a fundamental right, such as free speech, this Court must analyze the statute under the above-described, lenient 'rational relationship' test, *see Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-96 (1983), asking 1) whether the provisions have a legitimate purpose, and 2) whether it was 'reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose. . . .' *Western & Southern Life Ins. Co.*, 451 U.S. at 668.

"CWM argues that the Base Fee deprives it of equal protection of the law because it only applies to *commercial* hazardous waste facilities, and its Emelle operations constitute the only such facility in Alabama. The Court does not agree with this contention. First, the Court does not agree with the implication that CWM has somehow been 'singled out' because the Base Fee, as a practical matter, only applies to it. There is no evidence to suggest that Act No. 90-326 will not apply to commercial hazardous waste facilities which are sited in Alabama in the future. Until that time, any regulation of commercial hazardous waste facilities will necessarily fall on CWM alone. This fact, however, does not prevent the legislature from regulating CWM's operations.[4]

"Second, the Court finds that the legislature's treatment of commercial hazardous waste facilities differently from non-commercial facilities is rationally related to legitimate state interests. The evidence at trial established several reasons for the differentiation. For example, the use of commercial disposal sites poses unique health and safety risks, such as the transportation of dangerous materials to the sites with the risk of accidents involving such transportation, and the accumulation in one place of extremely large volumes of different types of waste. The number of trucks delivering hazardous waste to the Emelle facility alone was approximately 40,000 during 1989, and was expected to increase in subsequent years. Hazardous waste disposal at non-commercial facilities, however, does not involve transportation of the materials to be disposed of, with the dangers inherent in and unique to such transportation. Such facilities dispose of their waste on-site. In *CECOS International, Inc. v. Jorling*, 895 F.2d 66 (2d Cir. 1990), the plaintiffs argued that a state law requiring siting board approval for the expansion of commercial, but not non-commercial, hazardous waste facilities violated equal protection. The Second Circuit rejected this argument because the state provided several reasons for applying this requirement to commercial facilities. The reasons included the fact *'that there are greater risks associ-*

---

[4] CWM's claim that the legislature was motivated by improper motivations is also irrelevant for equal protection purposes. '[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of those who voted for it.' *Palmer v. Thompson*, 403 U.S. 217, 224, 91 S.Ct. 1940, 1944, 29 L.Ed.2d 438 (1971), *cited in CECOS International v. Jorling, supra*, 895 F.2d at 73."

ated with commercial facilities because hazardous wastes must be transported to the off-site commercial facility.' Id. at 73 (emphasis supplied). The State of Alabama has offered similar reasons for the classification now before the Court.

"Moreover, commercial landfill facilities comprise the bulk of the hazardous waste accumulation problem. The waste disposed of at commercial facilities exceeds many times the waste disposed of on site by non-commercial facilities. Additionally, without regard to the health, safety and environmental concerns, and viewing the fees simply as taxes, the legislature is not precluded from taxing a commercial transaction simply because it does not impose the tax on a similar non-commercial activity. Many constitutionally permissible tax measures treat different taxable entities in different ways.

"Thus, CWM has failed to meet its burden of negating every conceivable basis which might support Act No. 90-326's differing treatment of commercial and non-commercial facilities. *White v. Reynolds Metals Co., supra.* The differentiation serves a legitimate purpose and it was reasonable for the legislature to believe that the classification promotes that purpose. This Court, therefore, must defer to the legislature's classification of these two types of facilities.

"(3) *The Due Process Challenge*

"Article I, section 6 of the Alabama Constitution states, among other things, that no accused in a criminal prosecution shall be deprived of life, liberty, or property except by due process of law. This right has been extended to civil trials. *Ross Neely Express, Inc. v. Alabama Dep't. of Environmental Management*, 437 So.2d 82, 84 (Ala. 1983). In order to avoid violating the Due Process Clause of the Ala-

bama Constitution, a legislative classification must be reasonable and not arbitrary. *White v. Associated Industries of Alabama, Inc.*, 373 So.2d 616, 617 (Ala. 1979).

"The Base Fee is reasonable in function. It provides some financial assurance against the risks associated with materials posing a permanent threat to health, safety and the environment. The burden imposed is not an excessively heavy one. While CWM's right to maximize profits is certainly important, it does not by any stretch of the imagination outweigh the state's interest in protecting the health and safety of its citizens and environment. Under any kind of 'rational and reasonable' analysis, therefore, the Base Fee is clearly valid.

II.

Next we must consider whether the trial court erred in holding that the Cap provision of Act No. 90-326 is constitutional and is not preempted by federal statautes.[5] We find the reasoning and the conclusions of law by the trial judge to be persuasive on this issue. We therefore adopt Judge Phelp's order of February 28, 1991, as to the issue of the Cap provision, as the decision of this Court:

"THE CAP PROVISION

"(1) *The Commerce Clause Challlenge*

"The Court now turns to the question of whether the 'Cap' provision violates the Commerce Clause. This provision states that no commercial hazardous waste disposal facility which takes in more than

[5] (1) the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.*; (2) the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 *et seq.*; (3) the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*

100,000 tons of hazardous waste annually may dispose of more waste in the year starting October 1, 1991 than it disposed of during the statutory benchmark period, regardless of the origin of the waste. The position of CWM would allow it, and not the Alabama legislature, to determine what volume of hazardous waste will be buried permanently in the state. CWM insists that the Cap provision, like the fees, is an impermissible legislative interference with its rights to dispose of and to bury in Alabama whatever volume of such waste that it wishes. This Court disagrees, and concludes that the Cap provision is no more violative of the Commerce Clause than the Base Fee, and for many of the same reasons.

"The Cap provision applies equally to in-state and out-of-state waste. Accordingly, the *Pike v. Bruce Church* balancing test must be utilized to assess its validity under the Commerce Clause. Like the Base Fee, the Court finds that the Cap provision regulates evenhandedly to effectuate a legitimate local interest. Tonnage restrictions which apply equally to all waste, regardless of origin, do not violate the Commerce Clause. *Wetzel County Solid Waste Authority v. West Va. Div. of Natural Resources*, 401 S.E.2d 227 (W.Va. 1990). The state has a clear and legitimate interest in conserving its natural resources—the Selma chalk and the Eutaw acquifer—and in protecting the health and safety of its citizens. The state also has a legitimate interest in protecting the environment surrounding the Selma chalk and the Eutaw aquifer and in extending the life of the landfill for the benefit of in-state and out-of-state waste generators. The Cap provision promotes this interest without discrimination by limiting the amount of waste that can be disposed of at Emelle during any 12-month period. *See County of Washington v. Casella Waste Management, Inc.*, 1990 WL 208709

(N.D.N.Y. Dec. 6, 1990) (stating that local law prohibiting all out-of-county solid waste served a legitimate local purpose in protecting public health and safety as well as the environment, and noting that one of the legitimate effects of the local law might be to extend the useful life of safe landfills); *and Bill Kettlewell Excavating, Inc. v. Michigan Dept. of Natural Resources*, 732 F.Supp. 761 (E.D. Mich. 1990) (holding that statute requiring county approval for disposal of out-of-county solid waste served legitimate purpose of extending lives of the county's landfills). The Cap provision also furthers Alabama's legitimate interest in controlling health and safety risks by, in effect, regulating the amount of waste being transported on the state's highways and to its landfills. The Court again notes that landfilling is the least desirable form of waste disposal as it poses a perpetual threat to the ground and surface waters in the landfill's vicinity and to the surrounding environment. The Cap provision necessarily encourages the development of new technologies to supplement and minimize hazardous waste landfilling.

"Finally, any burden which the Cap provision might place on interstate commerce is speculative. The Cap limits the amount of waste in successive years only to that amount landfilled during the 1990-91 benchmark period. . . . Thus, the Cap creates no discriminatory burden on existing levels of commerce or on existing rates of waste generation and landfilling. The Cap provision permits increased volumes if such is warranted in accord with safety or to comply with State or federal regulations.[6] Thus, the

[6] "The Court notes that the Cap provision contains the following language: 'Provided, however, that the Governor or the Governor's designee may allow disposal of hazardous wastes or hazardous substances in excess of the tonnage disposed of during

Cap provision merely furthers the policy that future growth in the amounts of such waste to be disposed of must be accompanied by growth in the development and use of safer and more environmentally sound methods of disposal. (See § 9 of Act 90-326).

"(2) *The Supremacy Clause Challenge*

"CWM alleges that the Cap provision comes into conflict with three federal statutes: The Resource Conservation and Recovery Act ('RCRA'), 42 U.S.C.A. § 6901 *et seq.*, which governs treatment and disposal of solid waste, the Toxic Substances Control Act ('TSCA'), 15 U.S.C.A. § 2602 *et seq.*, which regulates the disposal of toxic wastes such as PCBs, and the Comprehensive Environmental Response Compensation, and Liability Act ('CERCLA'), 42 U.S.C.A. § 9601 *et seq.*, which provides federal funding for cleanup of hazardous and toxic substances. CWM's Emelle facility operates under permits issued in accordance with these federal statutes, and CWM argues that the Cap provision directly conflicts with either the provisions or the goals of all three. The Court disagrees, and will treat each statute in turn.

"(a) *The Cap Provision Does Not Conflict With, Frustrate, or Impede the Operation of RCRA.*

"RCRA, as amended in 1983, is a 'cradle to grave' regulatory program which sets standards for the generation, treatment, storage, and disposal of hazardous waste. RCRA is designed to promote several goals with regard to hazardous waste: 1) as-

---

the benchmark period if such action is determined by the Governor or the Governor's designee to be necessary to protect human health or the environment in the state, or to allow the State to comply with its obligations to assure disposal capacity pursuant to applicable state or federal law as determined by the Governor or his designee.' *Act 90-326, § 9.*"

suring that hazardous waste management is conducted in a way that protects human health and the environment; 2) requiring that hazardous waste be properly managed from the outside; and 3) minimizing the generation of hazardous waste and the landfilling of hazardous waste by encouraging process substitution, materials recovery, recycling, and treatment. 42 U.S.C.A. § 6902(b).

"RCRA demonstrates a strong policy against landfilling. In the congressional findings accompanying the 1983 amendments, Congress found that 'reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least-favored method for managing hazardous wastes. . . .' 42 U.S.C.A. § 6910 (b)(7). Congress also maintained that alternatives to land disposal 'must be developed.' *Id.* at § 901 (b)(8). The floor debates which preceded the passage of the amendments repeatedly emphasized concerns about the dangers of landfill disposal. Congresswoman Schneider stated that the bill required a 'direct economic disincentive for the land disposal of hazardous waste,' and advocted supplementing the measure with 'economic incentives that encourage alternatives to land disposal.' 29 CONG. REC. pt 17 (1983), p. 23164. Congressman Walgren argued,

> " 'In my view, our society should seriously question the continued land disposal of hazardous wastes. If we can find ways to dispose or neutralize hazardous waste instead of dumping it in the ground, we should. Ground disposal is inherently dangerous because subsequent contamination of liners in landfills can be penetrated with underground water. There are other ways to dispose of wastes that we should turn to. . . .'

Id. at p. 23163. Congressman Frenzel similarly stated, 'continued reliance on land disposal of haz-

ardous wastes is a dangerous policy which threatens the health of Americans now and in the future.' *Id.* at p. 23161.

"In light of these concerns, this Court finds that the Cap provision is consistent with what the Congress had in mind when passing RCRA—reducing the amount of landfilled waste—and furthers, rather than frustrates the purpose of RCRA. The Cap provision is a mechanism which will encourage generators to find ways other than landfilling to dispose of their hazardous wastes, and this is exactly what Congress emphasized in RCRA.

"Further, RCRA directly addresses the question of federal/state supremacy. Section 6929 states that no state may impose treatment and disposal requirements less stringent than those prescribed in RCRA, and further states, 'Nothing in this chapter shall be construed to prohibit any state . . . from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations.' RCRA sets a floor, a minimum level of regulation by which all states must abide. State actions or regulations which go above that floor—which are more stringent than RCRA—are expressly permitted. The Cap provision, being more stringent than the requirements of RCRA, is clearly permissible. In short, there is no indication that the Cap provision conflicts with or impedes the operation of RCRA in any way.

"(b) *The Cap Provision Does Not Conflict With, Frustrate, or Impede the Operation of TSCA.*

"TSCA regulates the handling of toxic chemical substances and mixtures in an attempt to promote the promulgation of adequate data concerning the risks involved with such substances. In particular,

Congress wishes through TSCA to encourage technological innovation, while at the same time ensuring that such innovation did not 'present an unreasonable risk of injury' to health or the environment.' 15 U.S.C.A. § 2601(b)(3). Again, in light of this policy, the Court finds that the Cap provision, one effect of which will be to encourage the development of alternative disposal technologies while minimizing the amount of waste landfilled, does not 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting TSCA,' as CWM claims. In light of express congressional policy discouraging and disfavoring the practice of burying such highly dangerous materials in the ground, the Court cannot conceive that Congress, in enacting TSCA, intended to grant landfill operators a right to bury unlimited amounts of such materials. Nor does the Court find that such unlimited burial is necessary to the implementation of that Act.

"(c) *The Cap Provision Does Not Conflict With, Frustrate, or Impede the Operation of CERCLA.*

"'[T]he primary purpose of CERCLA is the prompt cleanup of hazardous waste sites.' *State of Alabama v. United States Environmental Protection Agency*, 871 F.2d at 1557-58 (quoting *Dickerson v. Administrator, EPA*, 834 F.2d 974, 978 (11th Cir. 1987)). CERCLA allows the Administrator to promulgate regulations involving substances which, when released, could cause harm to the environment. 42 U.S.C.A. § 9602(a). It requires anyone who has knowledge of the release of such a substance greater than a designated amount to notify the United States government. 42 U.S.C.A. § 9603. Whenever such a release occurs, CERCLA authorizes the President to

remove the substance and/or provide for remedial action, or to take any other response 'consistent with the national contingency plan.' 42 U.S.C.A. § 9604 (a). Along with 26 U.S.C.A. § 9507, CERCLA establishes a trust fund, commonly known as 'Superfund,' to be used to pay costs incurred by the government in providing this help. 42 U.S.C.A. § 9611.

"CWM argues that the Fee Act's Cap provision artificially requires the Emelle facility to withhold capacity that otherwise would be available immediately for the disposal of waste generated at Superfund cleanup sites located outside of the State of Alabama, and that the provision 'undermines Congress's goal of making the best use of existing waste treatment and disposal facilities in the short term.' CWM's argument is based on the assumption that Alabama has the burden under CERCLA of meeting the capacity assurance requirements of other states. This Court does not agree. CERCLA places the capacity assurance burden on the state *generating* the waste, not on the state importing it. Alabama is not required to provide enough capacity to dispose of all of the waste generated in the United States during the next twenty years; it has to assure the President only that it can provide capacity to dispose of *its own* waste during that period.

"Again, CWM is aruging that a statute designed to protect and promote health, safety and environmental quality indirectly evidences a congressional policy which directly conflicts with the *express* congressional policy against landfilling. CWM would have the Court construe CERCLA as being inconsistent with the policy clearly stated in another congressional enactment addressing the same general environmental quality concerns. This Court cannot find that Congress, in providing for clean-up of the results of past unsound waste disposal practices, in-

tended to imply a policy conflicting with its expressly stated condemnation of reliance on landfilling.

"(3) *The Due Process Challenge*

"Economic and social legislation, such as that involved herein, falls under the substantive component of the Due Process Clause, and the standard for evaluating its validity is virtually identical to the Equal Protection 'rational relationship' test. *In re Wood*, 866 F.2d 1367, 1371 (11th Cir. 1989).

> "'[Economic and social legislation] generally will be upheld against a substantive due process attack unless the legislation "manifests a patently arbitrary classification, utterly lacking in rational justification." *Fleming v. Nestor*, 363 U.S. 603, 611 . . . (1960). As with the "rational relationship" test, *any* plausible reason supporting Congress' action in enacting the suspect legislation satisfies the "rational basis" test. *Id.* at 612, 80 S.Ct. at 1373.'

Id. (emphasis in the original). This Court's analysis of CWM's Due Process challenge to the Cap provision, therefore, is very similar to its analysis of CWM's Equal Protection claims.

"CWM contends that the Cap provision 'arbitrarily and irrationally' deprives it of its property interest in the Emelle facility in violation of the Due Process Clause. However, where, as here, restrictions on waste disposal are related to the state's goal of preserving and managing landfill space and in protecting the health and safety of its citizens, such restrictions do not violate due process. *Bill Kettlewell Excavating, Inc. v. Michigan Dept. of Natural Resources*, 732 F.Supp. 761, 765 (E.D. Mich. 1990). Moreover, the state's reasons for treating hazardous waste buried in commercial facilities differently from

industrial wase buried on site are rational and are not arbitrary. The Cap provision is rationally related to reducing the transportation and accumulation of hazardous waste and similar dangerous substances in the state. When such a rational basis for a statute exists, it does not violate the Due Process Clause.

"(4) *The Contracts Clause Challenge*

"Article I, section 10 of the federal Constitution makes it unlawful for states to impair the obligations of contracts. Although debtor relief laws were the primary focus of the Contracts Clause, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502-503 (1987), the Clause has since been applied to other kinds of laws, including state laws that have the incidental effect of altering contractual obligations. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). A state statute does not violate the Contracts Clause 'simply because it has the effect of restricting, or even barring altogether, the performance of duties created by contracts entered into prior to its enactment.' *Exxon Corp. v. Eagerton*, 462 U.S. at 190. Rather, a court analyzing a Contracts Clause claim must employ a balancing test.

"First, the court must determine whether the state law has in fact substantially impaired the contractual relationship. *Spannaus*, 438 U.S. at 244.

> " 'The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.'

Id. at 245. Second, if the law does substantially impair the contractual rights, the state must show that the law was designed to promote a legitimate public purpose, such as remedying a general social or economic problem. *Energy Reserves Group v. Kansas Power and Light Co.*, 459 U.S. 400, 411-412 (1983). Finally, if the statute is shown to have a legitimate public purpose, the state must show that the law is based on reasonable conditions and that it is of a character appropriate to the public purpose. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 445-47 (1934). In making this determination, courts defer to the legislative judgment if the regulation invloved is social or economic. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22-23 (1977).

"Applying the above analysis, the conclusion is clear that the Cap provision does not violate the Contracts Clause. First, CWM has made no showing that the Cap provision has impaired its existing contracts. Second, even had CWM presented some proof that the Cap provision impaired its existing contracts, it is clear that the law was designed to promote a legitimate public purpose. Finally, as discussed above, the Cap provision is based on reasonable conditions: it allows CWM and the out-of-state generators to determine the cap amount. Moreover, it is of a character to promote the public purpose—it will prevent the amount of hazardous waste buried in the state from increasing in subsequent years. All three elements of the test balance in favor of the Cap provision.

"(5) *The Takings Clause Challenge*

"Under the Fifth Amendment to the United States Constitution, government is prohibited from taking private property for public use without just compensation. The question to be answered in determining

whether the Takings Clause has been violated is whether the governmental action amounts to a 'taking' requiring compensation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). To make this determination, a court must determine 1) whether there is a property interest involved, *see, e.g., Andrus v. Allard*, 44 U.S. 51, 65-66 (1979); and 2) whether that property interest has been diminished—in a case like the present one, whether there has been a diminution in the economic viability of the property by the state regulation, *see Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 485-86, or whether state infringement of the private property right was done in the legitimate exercise of Police Power or to advance a legitimate state interest and whether the infringement operates to further state interest and whether the infringement operates to further that interest, *see id.; Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). If the result of this analysis indicates that there has in fact been a taking, the remedy is generally payment of just compensation. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-42 (1987).

"The Cap provision has not affected a 'taking' within the meaning of the Takings Clause. This Court has already established several times over the fact that the Cap provision—indeed, the Fee Act as a whole—advances legitimate state interests. It is equally clear that the Cap provision has not made it commercially impracticable for CWM to continue operating its Emelle facility. CWM still owns the Emelle facility in its entirety. Its use has not been changed or restricted; it is still a commercial hazardous waste disposal facility. Comparing, then, 'the value that has been taken from the property with the value that remains in the property,' *DeBenedictis*, 480 U.S. at 497, the Court concludes that

even if some diminution in value has occurred, it by no means would constitute a taking requiring compensation under the Takings Clause."

III.

We next consider whether Act No. 90-326 is a "revenue bill" enacted in violation of Article IV, § 70, of the Alabama Constitution. We again adopt the trial court's order as the decision of this Court as to this issue:

"The Challenge Under § 70 of the Alabama Constitution

"The Court finds that enactment of the Fee Act did not violate Article IV, Section 70 of the Alabama Constitution. Article IV, section 70 of the Alabama Constitution provides:

> "'All bills for raising revenue shall originate in the house of representatives. The governor, auditor, and attorney general shall, before each regular session of the legislature, prepare a general revenue bill to be submitted to the legislature, for its information, and the secretary of state shall have printed for the use of the legislature a sufficient number of copies of the bill so prepared, which the governor shall transmit to the house of representatives as soon as organized, to be used or dealt with as that house may elect. The senate may propose amendments to revenue bills. No revenue bill shall be passed during the last five days of the session.'

CWM asserts that the Fee Act is a revenue bill which was enacted during the last five days of the legislative session, and that the enactment thus violated the last sentence of Article IV, section 70.

"This Court finds that the Fee Act is not a 'revenue bill' within the meaning of section 70. In *Woco Pep Co. of Montgomery v. Butler*, 225 Ala. 256, 142 So. 509 (1932), the Alabama Supreme Court explained the meaning of the term 'revenue bill' as it appears in the last sentence of section 70. The Constitution of 1875 contained only the first sentence of the present section 70. When the provision was rewritten for the Constitution of 1901, the last three sentences were added, defining a 'general revenue bill' and explaining how such a bill was to be enacted. The Supreme Court considered the added sentences in conjunction with the remarks of the committee chairman who presented the revision to the Constitutional Convention, and came to the conclusion that the last sentence of section 70 'was intended by the Constitution makers to apply only to *the general revenue bill*.' *Id.* at 511 (emphasis added). The Court held that the fact that the Constitution makers revised the penultimate sentence of section 70 to authorize the Senate to propose amendments to the general revenue bill and to amend specific bills for raising revenue only strengthened its conclusion that the term revenue bill 'related exclusively to and affected general revenue bills.' *Id. See also Opinion of the Justices*, 270 Ala. 38, 115 So.2d 464, 467-68 (1959); *Opinion of the Justices*, 269 Ala. 676, 115 So.2d 484, 485 (1959); *Opinion of the Justices*, 259 Ala. 514, 66 So.2d 921, 923 (1953); *Dorsky v. Brown*, 255 Ala. 238, 51 So.2d 360, 362, *cert. denied*, 342 U.S. 818 (1951). Because the Fee Act is not a general revenue bill, but a specific measure, section 70 does not apply."

IV.

We next consider whether the trial court erred in holding that the Additional Fee of Act No. 90-326 discriminates against interstate commerce in violation of the Commerce Clause.

The Commerce Clause does not invalidate all state restrictions on commerce. "It has long been recognized that 'in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.' *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767, 65 S.Ct. 1515, 1519, 89 L.Ed. 1915 (1945)." *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670, 101 S.Ct. 1309, 1316, 67 L.Ed.2d 580, 586 (1981). The constitutionality of a state regulation depends upon "a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Id.*, quoting *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 at 441, 98 S.Ct. 787, at 794, 54 L.Ed.2d 664, at 673 (1978).

In *New Energy Co. v. Limbach*, 486 U.S. 269, at 278, 108 S.Ct. 1803, at 1810, 100 L.Ed.2d 302 (1988), the United States Supreme Court stated the test in which a facially discriminatory statute may be found to be valid under the Commerce Clause:

> "Our cases leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. See, e.g., *Maine v. Taylor*, 477 U.S. at 138, 151, 106 S.Ct., at 2447, 2455; *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. at 958; *Hughes v. Oklahoma*, 441 U.S., at 336-337, 99 S.Ct. at 1736; *Dean Milk Co. v. Madison*, 340 U.S., at 354, 71 S.Ct., at 297. This is perhaps just another way of saying that what may appear to be a 'discriminatory' provision in the constitutionally prohibited sense—that is, a protectionist enactment—may on closer analysis not be so. However it be put, the standards for such justification

> are high. Cf. *Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S. Ct. 2531, 2535, 57 L.Ed.2d 475 (1978) ('where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected'); *Hughes v. Oklahoma*, 441 U.S., at 337, 99 S. Ct., at 1737 ('[F]acial discrimination by itself may be a fatal defect' and '[a]t a minimum . . . invokes the strictest scrutiny')."

In holding that the Additional Fee violates the Commerce Clause, the trial judge relied upon *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and *National Solid Wastes Management Ass'n v. Alabama Dep't of Environmental Management*, 910 F.2d 713 (11th Cir. 1990), modified and reh'g denied, 924 F.2d 1001 (11th Cir. 1991), reh'g en banc denied, —— F.2d —— (April 15, 1991); *cert. denied*, —— U.S. ——, —— S.Ct. —— (1991) [59 U.S.L.W., 3821, 3823, 3783 (June 10, 1991) (No. 90-1718)].

In *National Solid Wastes Management Ass'n* the 11th Circuit Court of Appeals held the "Holley Bill," Act No. 89-788, Code of Ala. 1975, § 22-30-11 (Supp. 1990), invalid under the Commerce Clause. The Holley Bill banned disposal of hazardous waste in Alabama from a number of states. The Court of Appeals stated:

> "Alabama's selective ban on out-of-state hazardous waste is no quarantine law. Alabama did not ban hazardous wastes from all other states on the ground that the wastes were dangerous to some human health or environment aspect which Alabama has a right to regulate. Alabama's ban does not distinguish on the basis of type of waste or degree of dangerousness, but on the basis of the state of generation."

Id., 910 F.2d at 721. Unlike the Holley bill, the Additional Fee provision of Act No. 90-326 has specifically been found by the legislature to be an effective way to

deal with health and environmental hazards to Alabamians created by hazardous waste imported here from other states. We believe that Alabama has a legitimate local interest which this Act legitimately serves, and is one that is permissible under the Commerce Clause.

The Supreme Court of the United States has not said that hazardous waste is an article of commerce. Assuming that it is an article of commerce, as the 11th Circuit Court of Appeals assumed, we believe that a statute such as the one before us, which advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives, can be valid under the Commerce Clause.

The trial court concluded that *City of Philadelphia v. New Jersey*, supra, compelled the conclusion that the legislation involved here was foreclosed by the Commerce Clause. We believe that that case is distinguishable under the facts here. That case involved a New Jersey statute that banned the movement of liquid or solid waste (but not hazardous waste) into the state. The purpose of that legislation was found to be economic protectionism, which was in violation of the Commerce Clause. CWM argues that the holding in *City of Philadelphia v. New Jersey* precludes state and local governments from responding to real and substantial public health and environmental dangers by controlling the importation of wastes. However, the United States Supreme Court cases make a distinction between state measures that discriminate arbitrarily against out-of-state commerce in order to give in-state interests a commercial advantage, i.e., simple economic protectionism, and state measures that seek to protect public health or safety or the environment. *Maine v. Taylor*, 477 U.S. 131, 148 n. 19 (1986).

In *City of Philadelphia v. New Jersey*, the Supreme Court made this distinction and decided that the New Jersey statute constituted economic protectionism, rather than a measure to protect the citizens of the state from

menaces to their health or safety. *City of Philadelphia v. New Jersey* does not hold that a state may not limit importation of wastes to protect health and the environment; it holds that a state may not do so for "simple economic protectionism." The Supreme Court has characterized *City of Philadelphia v. New Jersey* as involving "a state law purporting to promote environmental purposes" but is "in reality 'simple economic protectionism.'" *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981).

Mr. Justice Rehnquist, in his dissent in *City of Philadelphia v. New Jersey*, discussed the growing problem in our nation in the disposal of solid waste and the health and safety hazards associated with its disposal. There, in speaking not of hazardous waste, as in the present case, but of garbage, he noted that the United States Supreme Court has recognized that the States can enact quarantine laws, which "have not been considered forbidden protectionist measures, even though they were directed against out-of-state commerce." *Id.*, 437 U.S. at 631 (quoting the majority opinion, 437 U.S. at 628). Justice Rehnquist stated:

> "The Court recognizes, ante [437 U.S. at 621-624], that States can prohibit the importation of items, 'which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of smallpox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption.'"

437 U.S. at 631. (Citations omitted.) Justice Rehnquist considered the quarantine law cases dispositive of the issue, and would have allowed a state to regulate solid wastes from out-of-state.

In *Maine v. Taylor*, 477 U.S. 131 (1986), the United States Supreme Court made it clear that environmental measures are entitled to greater deference than ordinary legislative acts. The Court upheld a facially discriminatory state statute that banned all importation of live baitfish. The Court stated:

> "The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' . . . it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. The evidence in this case amply supports the District Court's findings that Maine's ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Maine has legitimate reasons 'apart from their origin, to treat [out-of-state baitfish] differently . . . .'"

477 U.S. at 151-52.

The Supreme Court in *Maine v. Taylor* cited *City of Philadelphia v. New Jersey* for the proposition that "[s]hielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to 'simple economic protectionism' consequently have been subject to a 'virtually *per se* rule of invalidity,'" while stating that, in contrast to *City of Philadelphia v. New Jersey*, "there is little reason in this case to believe that the legitimate justifications the State has put forward for its statute are merely a sham or a '*post hoc* rationalization.'" *Maine v. Taylor*, 477 U.S. at 148-49.

The Additional Fee provision in the Act advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. It has not been enacted for the purpose of economic protectionism. In enacting the Additional Fee, the Alabama legislature was not banning the collection and acceptance of hazardous waste; it was merely asking the states that are using Alabama as a dumping ground for their hazardous wastes to bear some of the costs for the increased risk they bring to the environment and the health and safety of the people of Alabama. As in *Maine v. Taylor*, the problem is already with us. Millions of tons of hazardous wastes have been buried at Emelle. The State of Alabama has a legitimate justification, apart from their origin, for treating the out-of-state wastes differently.

Because this waste is *permanently* stored in Alabama, the risk to the health and safety of the people of Alabama will continue in perpetuity. The costs to the state of regulation and monitoring of the facility will continue in perpetuity. A disproportionate share of these costs will be borne by the taxpayers of the State of Alabama for the wastes dumped by other states.

The Additional Fee serves these legitimate local purposes that cannot be adequately served by reasonable nondiscriminatory alternatives: (1) protection of the health and safety of the citizens of Alabama from toxic substances; (2) conservation of the environment and the state's natural resources; (3) provision for compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama; (4) reduction of the overall flow of wastes traveling on the state's highways, which flow creates a great risk to the health and safety of the state's citizens.

The testimony before the trial court showed that in 1985 some 341,000 tons of hazardous waste were buried in the Emelle facility. By 1989 the tonnage had grown to 788,000 tons per year. While CWM estimates that

there is capacity for storage at Emelle for 100 years, the increase in tonnage has more than doubled in four years.

As the trial judge noted in his findings of fact:

> "It is without dispute that the waste and substances being landfilled at the Emelle facility include substances that are inherently dangerous to human health and safety and to the environment. Such waste consists of ignitable, corrosive, toxic and reactive wastes which contain poisonous and cancer-causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death. Should a sudden or non-sudden discharge or release occur, hazardous wastes could pollute the environment, contaminate drinking water supplies, contaminate the ground water, and enter the food chain. Among these are arsenic, mercury, lead, chromium and cyanide. These wastes are generated by an entire spectrum of industry."

Unlike the situation in *City of Philadelphia v. New Jersey*, where there was questionable environmental concern, there is legitimate concern here in Alabama. There is no dispute that the wastes dumped at Emelle include known carcinogens and materials that are extremely *hazardous* and can cause birth defects, genetic damage, blindness, crippling, and death. These wastes are far more dangerous to the people of Alabama than rags infected with small-pox or yellow fever.

This Court takes judicial notice of the fact that there is a finite capacity for storage of hazardous waste at the Emelle facility and that the capacity is rapidly being reached. The record reflects that 85% to 90% of the tonnage that is *permanently* buried at Emelle is from out-of-state. There is nothing in the Commerce Clause that compels the State of Alabama to yield its total capacity for hazardous waste disposal to other states. To tax Alabama-generated hazardous waste at the same rate

as out-of-state waste is not an available non-discriminatory alternative, because Alabama is bearing a grossly disproportionate share of the burdens of hazardous waste disposal for the entire country. Here, the statute that creates the Additional Fee does not needlessly obstruct interstate trade, nor does it constitute economic protectionism. It is a responsible exercise by the State of Alabama of its broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

The Commerce Clause is designed to promote national unity and discourage economic protectionism. However, as previously stated, statutes that are facially discriminatory can survive the strict scrutiny of Commerce Clause analysis. In *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985), the Supreme Court examined Massachusetts and Connecticut statutes forbidding banks outside the New England region from taking over in-state banks, while allowing New England banks to do so. The Court held that this was a legitimate state purpose.

For the reasons stated above, we hold that the Additional Fee provision of Act No. 90-326 is not invalid under the Commerce Clause of the United States Constitution. The Additional Fee does not needlessly obstruct interstate trade or attempt to place Alabama in a position of economic isolation. It merely retains Alabama's broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. The evidence in this case amply supports the conclusion that the Additional Fee serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Alabama has legitimate reasons, apart from their origin, to treat out-of-state wastes differently. The judgment of the trial court is therefore reversed as to this issue.

The final issue before the Court is whether the trial court erred in holding that Governor Hunt had standing to raise the issue of the constitutionality of the Cap provision. CWM contends that the complaint it filed challenged the constitutionality of the Base Fee and the Additional Fee. Governor Hunt filed a counterclaim, seeking to have the trial court declare the Cap provision constitutional. CWM argues that the Governor lacked standing to raise that issue and cites *Casey v. Travelers Ins. Co.*, 531 So.2d 846, 849 (Ala. 1988), wherein this Court stated: "'Where a particular litigant is not within the group of persons effected by the statute or portion thereof which is allegedly unconstitutional, such litigant lacks standing to raise such constitutional issue.'" (Quoting *Fletcher v. Tuscaloosa Federal Savings & Loan Ass'n*, 294 Ala. 173, 178, 314 So.2d 51, 56 (1975).)

We find CWM's challenge to Governor Hunt's standing to be without merit. The Governor's counterclaim was filed only after CWM had sued him in a United States District Court, alleging that the Cap provision violated CWM's federally protected rights. Further, the trial court's jurisdiction over the question of the validity of the Cap provision was expressly invoked in CWM's original complaint alleging the invalidity of the entire Act. Thus, there existed a justiciable controversy that Governor Hunt, as a state official, had standing to raise in a counterclaim for a declaratory judgment. *Curry v. Woodstock Slag Corp.*, 242 Ala. 379, 6 So.2d 479 (1942).

For the reasons stated above, the judgment of the trial court is due to be affirmed as to all issues save the Additional Fee and reversed and the cause remanded as to the issue of the Additional Fee.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Hornsby, C. J., and Maddox, Almon, Adams, Steagall, and Ingram, JJ., concur.

Houston, J., concurs in the judgment.

HOUSTON, JUSTICE (concurring in the judgment).

Until the United States Supreme Court holds that hazardous waste (waste that the trial court found contained poisonous chemicals that can cause cancer, birth defects, genetic damage, blindness, crippling, and death) is an article of commerce protected by the Commerce Clause of the United States Constitution, I refuse to declare the additional fee provision of Act No. 90-326, which was duly enacted by the Alabama Legislature and approved by the Governor of Alabama, unconstitutional as violative of the Commerce Clause of the United States Constitution.

If the United States Supreme Court holds that waste containing poisonous chemicals that can cause cancer, birth defects, genetic damage, blindness, crippling, and death is an article of commerce protected by the Commerce Clause of the Constitution, then I am bound by that ruling under the Supremacy Clause of Article VI of the United States Constitution. Alabama lost that battle over 125 years ago; however, I do not believe that such waste is an article of commerce protected by the Commerce Clause, and I do not believe that the Alabama Supreme Court is bound by the decision of any *other* federal court on this issue. *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. 1970), cert. denied sub nom. *Lawrence v. Woods*, 402 U.S. 983, 91 S.Ct. 1658, 29 L.Ed.2d 148 (1971).

I can appreciate how Judge Phelps, a distinguished trial judge, could feel compelled to comply with a legal precedent of the 11th Circuit Court of Appeals, in the absence of an opinion on that point by this Court; however, "'there is a parallelism but not paramountcy'" between the 11th Circuit Court of Appeals and this Court, "'for both . . . courts are governed by the same reviewing authority of the [United States] Supreme

Court.'" *United States ex rel. Lawrence v. Woods*, 432 F.2d at 1075, quoting the Supreme Court of New Jersey in *State v. Coleman*, 46 N.J. 16, 214 A.2d 393, 403 (1965), cert. denied, 383 U.S. 950, 86 S.Ct. 1210, 16 L.Ed.2d 212 (1966).

APPENDIX B

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

Civil Action No. CV 90-1098

CHEMICAL WASTE MANAGEMENT, INC., PLAINTIFF

v.

THE ALABAMA DEPT. OF REVENUE; JAMES M. SIZEMORE, JR., as Commissioner of the ALABAMA DEPARTMENT OF REVENUE; GUY HUNT, as Governor of Alabama; CLAUDE EARL FOX, M.D., M.P.H., as State Health Officer; and the STATE BOARD OF HEALTH, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Chemical Waste Management, Inc. ("CWM") filed this action against Guy Hunt, as Governor of the State of Alabama; James M. Sizemore, Jr., as Commissioner of the Alabama Department of Revenue; and the Alabama Department of Revenue. Claude Earl Fox, State Health Officer, and the State Board of Health later intervened. CWM seeks declaratory and injunctive relief to invalidate portions of Alabama Act No. 90-326, which was signed into law by the Governor on April 17, 1990. Governor Hunt has counterclaimed for declaratory relief seeking to uphold the fees and the annual limit or "Cap" provisions therein. Having considered the testimony, exhibits, numerous briefs filed by the parties, and the applicable law, the Court makes the following findings of fact and conclusions of law:

I. BACKGROUND

In April, 1990 the State of Alabama enacted Act No. 90-326 (the "Act"). The Act imposes, effective July 15, 1990, a base fee of $25.60 per ton on all waste disposed of at commercial hazardous waste disposal facilities, regardless of the state of origin (the "Base Fee"). The Act imposes an additional fee of $72.00 per ton on all hazardous waste generated outside the state and landfilled at such commercial hazardous waste disposal facilities (the "Additional Fee"). The Additional Fee required for hazardous waste generated out of state makes no distinction on the basis of type of hazardous waste, the degree of dangerousness or as to what hazard minimization measures may have been utilized for the out-of-state generated waste. In addition, Section 9 of the Act contains a provision which limits the annual amount of waste disposed of at any affected facility (those handling more than 100,000 tons annually) after July 14, 1991 to the amount disposed of from July 15, 1990 to July 14, 1991 (the "Cap" provision). This Cap provision applies to a total volume without distinction with regard to whether the waste was generated in or out of Alabama. CWM contends that both the Base Fee and Additional Fee violated the Commerce Clause of the Federal Constitution, the Equal Protection Clause of the Federal Constitution and its equivalents under the State Constitution, and the Due Process Clause of the State Constitution. CWM further contends that the Act is a "revenue bill" enacted during the last five days of the legislative session in violation of Article IV, Section 70 of the Alabama Constitution. Furthermore, CWM contends that the Cap provision violates the Commerce, Due Process, and Equal Protection Clauses of the Federal Constitution and is preempted by various federal statutes.

II. LEGISLATIVE FINDINGS AND LEGISLATION

Certain of the legislative findings underlying Act No. 90-326 are set forth as follows:

Act §1, Code § 22-30B-1.1 Legislative findings. The legislature finds that:

(a) The state is increasingly becoming the nation's final burial ground for the disposal of hazardous wastes and materials;

(b) The volumes of hazardous wastes and substances disposed in the state have increased dramatically for the past several years;

(c) The existence of hazardous waste disposal activities in the state poses unique and continuing problems for the state;

(d) As the site for the ultimate burial of hazardous wastes and substances, the state incurs a permanent risk to the health of its people and the maintenance of its natural resources that is avoided by other states which ship their wastes to Alabama for disposal;

(e) The state also incurs other substantial costs related to hazardous waste management including the costs of regulation of transportation, spill cleanup and disposal of ever-increasing volumes of hazardous wastes and substances;

(f) Because all waste and substances disposed at commercial sites for the disposal of hazardous waste and hazardous substances, whether or not such waste and substances are herein defined as hazardous, contribute to the continuing problems created for the state, and because state and federal definitions of "hazardous wastes" have regularly changed and are likely to change in the future to include waste not previously defined as hazardous, it is necessary that

all waste and substances disposed of at a commercial site for the disposal of hazardous waste or hazardous substances be included within the requirements of this act;

(g) The legislature finds that the public policy of the state is to encourage business and industry to develop technology that will eliminate the generation of hazardous waste and substances. . . .;

* * * *

(h) Since hazardous wastes and substances generated in the state compose a small proportion of those materials disposed of at commercial disposal sites located in the state, present circumstances result in the state's citizens paying a disproportionate share of the costs of regulation of hazardous waste transportation, spill cleanup and commercial disposal facilities. Persons, firms or corporations which generate and dispose of such waste and substances in Alabama presently are among the taxpaying citizens of this state who must bear the burden of regulation, inspection, control and clean-up of hazardous waste sites; addressing the public health problems created by the presence of such facilities in the state; and, preserving this state's environment while those generating this waste in other states and shipping it to Alabama for disposal presently are not. This act attempts to resolve that inequity by requiring all generators of waste being disposed of in Alabama to share in that financial burden.

(i) The operators of commercial sites for the disposal of hazardous wastes or hazardous substances have the ability to control the flow of said wastes or substances into said sites. Further, said operators, by exercise of said ability to control the flow of wastes or substances disposed at sites during a twelve-month period, only to enlarge the amount of wastes disposed during the next twelve-month period

by a proportionate amount. The health of the population of this state and the soundness of the environment of this state are and would be threatened by such an exercise of control. Said exercise of control could cause an artificial decrease in fees during the twelve-month period beginning July 15, 1990, and ending July 14, 1991. To prevent threats to the health of the population of this state and to the soundness of the environment of this state and to prevent an artificial decrease in fees during the twelve-month period beginning July 15, 1990, and ending July 14, 1991, this act provides a cap on the amount of hazardous waste and hazardous substances disposed during the twelve-month period beginning October 1, 1991, said cap being a function of the amount of hazardous waste and hazardous substances disposed during the twelve-month period beginning July 15, 1990, and ending July 14, 1991.

* * * *

The pertinent provisions of Act No. 90-326 are set out as follows:

Act § 3(a), Code § 22-30B-2(a) (the "Base Fee"):

In addition to other fees levied, there is hereby levied a fee to be paid by the operators of each commercial site for the disposal of hazardous waste or hazardous substances in the amount of $25.60 per ton for all waste or substances disposed of at such site.

Act § 3(b), Code § 22-30B-2(b) (the "Additional Fee"):

For waste and substances which are generated outside of Alabama and disposed of at a commercial site for the disposal of hazardous waste or hazardous substances in Alabama, an additional fee shall be levied at the rate of $72.00 per ton.

Act § 9, Code § 22-30B-2.3 (the "Cap Provision"):

Any commercial site for the disposal of hazardous waste or hazardous substances that disposes of in excess of 100,000 tons of hazardous waste or hazardous substances during the twelve-month period beginning July 15, 1990, and ending July 14, 1991, (hereinafter referred to as the benchmark period) shall not, during any twelve-month period beginning October 1, 1991, and any twelve-month period thereafter, dispose of more than the tonnage received during said benchmark period. Such restriction shall be in addition to any other ban or restrictions on disposal imposed by any regulatory authority. Provided, however, that the Governor or the Governor's designee may allow disposal of hazardous wastes or hazardous substances in excess of the tonnage disposed of during the benchmark period if such action is determined by the Governor or the Governor's designee to be necessary to protect human health or the environment in the state, or to allow the state to comply with its obligations to assure disposal capacity pursuant to applicable state or federal law as determined by the Governor or his designee.

Act § 2, Code § 22-30B-1 (Definitions):

(3) HAZARDOUS SUBSTANCE(S). Any substance defined as a hazardous substance pursuant to 42 U.S.C. § 9601(14), as amended, or listed as a hazardous waste pursuant to the Code of Alabama 1975, Section 22-30-10, as amended.

(4) HAZARDOUS WASTE(S). Those wastes defined at Section 22-30-3(5), Code of Alabama 1975, as amended, or listed pursuant to Section 22-30-10, Code of Alabama 1975, as amended, or department regulations.

III. FINDINGS OF FACT

1. Based on statements and representations made by the parties during pretrial proceedings, the Court accepts the legislative findings supporting Act No. 90-326. In addition, the Court finds that the evidence at trial adequately supports the legislative findings. The Court further finds that the Base Fee and Cap provisions of Act No. 90-326 which this Court determines and finds to be constitutionally permissible are integral parts of a regulatory procedure which appropriately addresses the concerns expressed by the Alabama Legislature when it enacted the "Hazardous Wastes Management Act of 1978." The following statement of Legislative Finding, Purpose and Intent is set forth in this 1978 legislation:

> Section 2. Legislative Finding, Purpose and Intent —The Legislature finds that increasing quantities of hazardous wastes are being generated in the State and that without adequate safeguards from the point of generation through handling, processing and final disposition, such wastes can create conditions which threaten human or animal health and the environment. The Legislature, therefore, declares that in order to minimize and control any such hazardous conditions it is in the public interest to establish and to maintain a statewide program to provide for the safe management of hazardous wastes.

Acts 1978, 2nd Ex.Sess., No. 129, p. 1843.

A. *The Emelle Facility*

2. CWM is a Delaware corporation with its principal place of business in Oak Brook, Illinois. CWM is the owner and operator of one of the nation's oldest and largest commercial hazardous waste land disposal facilities located in Emelle, Alabama (the "Emelle facility"). The Emelle facility is a hazardous waste treatment, storage, and disposal facility operating pursuant to a permit

issued by the Environmental Protection Agency ("EPA") under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* ("RCRA") and the Toxic Substances Control Act, 15 U.S.C. §§ 2601 *et seq.* ("TSCA"). In addition, the Emelle facility is authorized to operate under state law pursuant to interim status authority granted under Alabama Code §§ 22-30-12(i). The Emelle facility is the only commercial hazardous waste landfill facility currently in operation in the State of Alabama.

3. In a 1973 study, EPA identified 74 potential sites for hazardous waste landfills throughout the country, of which Emelle was one. Although hazardous waste landfills can be designed and engineered to operate in practically every state of the United States, only a very few commercial sites presently exist. Efforts to obtain permits for new sites in other states are resisted by citizens of those states.

4. According to the testimony presented at trial, only one additional hazardous waste landfill has been permitted in the United States since the effective date of RCRA, November 17, 1980. That facility, in Last Chance, Colorado, has never operated or accepted waste and is presently for sale.

B. *The Increasing Volumes of Out-of-State Wastes at Emelle*

5. Increasing amounts of out-of-state hazardous wastes are being shipped to Emelle for permanent storage from in-state generators and from those in states throughout the country. The following tonnage has been received by Emelle in the years indicated:

1985	341,000 tons
1986	456,000 tons
1987	564,000 tons
1988	549,000 tons
1989	788,000 tons

The increase in tonnage has resulted in a significant increase in problems with regard to regulating and supervising the disposal of hazardous waste at Emelle. Eighty-five to ninety percent of the tonnage permanently buried at Emelle is from out-of-state. Emelle received two years ago approximately 17% of all hazardous wastes commercially landfilled in the United States.

6. CWM estimates there is capacity at Emelle for another 100 years of operation. CWM has admitted that without the restrictions imposed by the Alabama legislature, "the total annual demand for disposal capacity at the Emelle facility for hazardous waste generated out-of-state is projected to increase annually." (Paragraph D of Answer of CWM to Defendant Hunt's Counterclaim).

7. A portion of the wastes coming to Emelle are classified as non-hazardous. Some of these non-hazardous industrial wastes are sent to the Emelle facility by industries which may be seeking to reduce their own liability should these wastes become classified as hazardous wastes in the future. Additionally, these non-hazardous wastes are commingled with the hazardous wastes that are landfilled at the Emelle facility and therefore for the purposes of long-range monitoring and potential cleanup, must be treated as hazardous waste in any event. EPA, moreover, has made limited progress in identifying hazardous wastes to be regulated and does not know whether it has identified 10% or 90% of existing hazardous wastes. As a result, wastes which today are deemed non-hazardous may very well in the future be deemed hazardous for one reason or another.

C. *The Permanent Risks and Costs of Hazardous Waste Landfilling*

8. It is without dispute that the wastes and substances being landfilled at the Emelle facility include substances that are inherently dangerous to human health

and safety and to the environment. Such waste consists of ignitable, corrosive, toxic and reactive wastes which contain poisonous and cancer causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death. Should a sudden or non-sudden discharge or release occur, hazardous wastes could pollute the environment, contaminate drinking water supplies, contaminate the ground water, and enter the food chain. Among these are arsenic, mercury, lead, chromium and cyanide. These wastes are generated by an entire spectrum of industry.

9. Landfilling is the least desirable means of hazardous waste disposal. Many hazardous wastes remain in the environment and do not break down. Although some wastes degrade or can be made less hazardous through treatment, many substances remain hazardous forever.

10. Although hazardous wastes are now required to be solidified before being placed in a landfill, seepage of groundwater and surface water into closed trenches at Emelle containing liquid or solidified wastes creates a poisonous liquid known as leachate. Scientists are continuing to learn more about leachate and water pressures. As concluded in the August, 1983 report to CWM by Golder Associates, the accumulation of leachate in closed trenches will result in a "vertical head difference serv-[ing] as the driving force which will eventually cause exfiltration of fluid within the landfill trenches outward into the surrounding chalk." The testimony at trial was that it appears that leakage has already occurred with respect to at least some of the closed trenches. Leachate is presently pumped only from closed Trench 19 and open Trench 21. It is stored in above ground storage tanks with a capacity of 5 million gallons. From 10 million to 15 million gallons annually of leachate and surface water are gathered, stored and transported from Emelle at a cost of $2 to $3 million.

11. EPA has found that absolute prevention of migration of hazardous waste through synthetic trench liners is beyond the current technical state of the art, and that some migration will occur. The liners will probably retard migration only for the relatively short-term measured in tens of years. Although it appears that leachate is already seeping into the Selma chalk, it is uncertain how far it has moved and at what rate it will travel. There are widely varying estimates as to travel time. A November, 1987 joint report of the hazardous waste Ground-Water Task Force of EPA and the Alabama Department of Environmental Management ("ADEM") entitled "Evaluation of Chemical Waste Management, Inc., Emelle, Alabama", stated at page 30 as follows:

> "The transit time through the Selma chalk ('to the Eutaw Formation. . . uppermost aquifer') was estimated by CWM to be 10,000 years. Independent EPA estimates of transit time using conservative estimate for equation variable were 330 years and 3,000 years for estimates using Darcy's Equation and a 2-D solute transport model, respectively. . . ."

Those transit time estimates all involve complicated calculations based upon highly variable factors.

12. The evidence shows that possibly a more serious concern is the lateral migration of leachate from the trenches following the downward gradient to the drainage areas leading to Bodka Creek, a tributary of the nearby Noxubee and Tombigbee Rivers. Although the closed trenches studied by Golder Associates in a August, 1990 report range from 50 to 150 feet apart, a CWM expert witness testified it would not surprise him if there were a migration of fluid from some of the closed trenches to other closed trenches; that there probably is some interconnection between those trench walls; and that fluid could move along the near surface defects in the downgradient direction.

13. The Selma Group Chalk Formation, in which the Emelle facility is located, extends across the states of Alabama, Mississippi, Arkansas and Texas. Although the chalk generally is of low permeability and is potentially suitable for the geological containment of hazardous wastes, the geologic integrity of the chalk also depends on the permeability of fractures, faults and other discontinuities. Faults and fractures exist throughout the Selma chalk at Emelle through which the leakage of hazardous waste and leachate may be greatly facilitated. Dr. Richard Groshong, a geology professor at the University of Alabama, testified that the faults and fractures may accelerate travel time through the Selma chalk by several orders of magnitude. According to Dr. Groshong, these rates "are important on a human time scale as opposed to a geological time scale." Tom Joiner, a former State Geologist, agreed that a "brittle fault" might speed the migration of leachate through the Selma chalk.

14. Dr. Groshong testified that there is a further need to identify, map, and study the faults and fractures at the Emelle facility. However, there will always be uncertainty with respect to the faults and fractures.

15. To monitor leachate and hazardous waste leakage, CWM has been required to install a large number of monitoring wells at Emelle. Periodic checks of those monitoring wells will be required forever. One CWM witness estimated the present annual costs of that monitoring system is between $100,000 and $200,000. Another CWM official estimated monitoring costs of Emelle to be in excess of $1½ million per year. It is doubtful that monitoring wells can be placed in sufficient locations to monitor all the movement of water as such monitoring may prove to be impractical. Thus, the uncertainty of whether all contamination will be detected will likely remain. Indeed, the existence of monitoring wells creates new conduits for hazardous wastes to reach underlying groundwater.

16. The Emelle facility is within an earthquake risk zone as designated by the Alabama Emergency Management Agency. There was testimony to the effect that earthquakes pose an uncertain short and long range risk to the Emelle facility. In 1886 an earthquake in Sumter County caused a one-half foot movement in the ground surface. There was evidence that, depending upon its severity, an earthquake could unseal cracks in the chalks and open avenues for the movement of leachate and hazardous wastes.

D. *Transportation and Spills*

17. In 1989, approximately 40,000 truckloads of wastes were transported over the public highways to the Emelle facility of which approximately 34,000 to 36,000 were from out of state. As in the operation of the facility, transportation of these wastes, no matter how elaborate the precautions, also creates unquantifiable risk or uncertainty to the public health and to the environment.

Some trucks destined for Emelle have been involved in accidents causing hazardous waste to be spilled or released into the environment. Additionally, several incidents of releases of hazardous wastes and noxious fumes have already occurred at the facility. These risks are increased by the increasing volumes. The hazardous wastes landfilled at the Emelle facility are inherently dangerous in their transportation and movement into or from one place to another throughout the State of Alabama. That movement into and through the State of Alabama carries the potential and risk of spills, accidents and explosions that could release toxic fumes and contaminate the groundwater and/or surface water. The increasing volumes have increased the risks and liability involved in that transportation.

E. *Permanence of Dangers and Financial Risks*

18. Although it will be necessary to monitor, regulate, maintain (including the pumping, collection, storage, transportation and disposal of leachate from the trenches), and secure the facility forever, CWM has made no provision for the payment of such costs beyond a period of 30 years after closure. Additionally, there has been no provision for the payment of any abatement, corrective, or remediation costs, compliance monitoring, third-party damages or natural resource damage.

19. Whenever CWM's planned or unplanned cessation of activities at Emelle occurs, there will be substantial financial and environmental risks to the people, businesses, and corporations of Alabama.

20. Alabama has a legitimate interest in guarding against the various imperfectly understood environmental risks posed by the storage of large quantities of hazardous wastes in Alabama, as well as the risks which may be more easily identified.

F. *The Legislative Classifications*

21. The CWM hazardous waste facility at Emelle currently is the only commercial hazardous waste landfill in Alabama. Of the 788,000 tons of waste landfilled at Emelle during 1989, 68,000 to 69,000 tons were generated in-state, or 8.6% of the 1989 total.

22. There is only one, relatively small non-commercial hazardous waste landfill facility presently permitted for hazardous waste in Alabama. It is in Washington County, and it accepts only on-site generated hazardous waste of approximately 4000 tons a year.

23. Closed non-commercial hazardous waste landfills (such as Sanders Lead in Troy) are not comparable to Emelle. They only accepted on-site generated hazardous waste and are no longer in operation.

24. Non-commercial hazardous waste facilities are not comparable to commercial hazardous waste facilities. Commercial facilities are likely to involve the transportation of wastes from off-site locations, and the accumu-

lation and disposal of relatively large quantities of hazardous wastes; most non-commercial facilities dispose of wastes on-site, and generally do not involve transportation. The amounts generated and disposed of at non-commercial facilities are far smaller than amounts disposed of at commercial facilities. Accordingly, the public health and safety risks associated with commercial hazardous waste facilities are much greater than those associated with non-commercial facilities.

25. Incinerators are not comparable to commercial hazardous waste landfills. Incinerators permanently destroy hazardous waste, leaving only a small residue which must be landfilled.

26. Should additional commercial hazardous waste landfills be permitted in Alabama, and meet the statutory criteria, the provisions of Act 90-326 would apply to them just as they apply now to CWM.

IV. CONCLUSIONS OF LAW

A. *The Base Fee*

(1) *The Commerce Clause Challenge*

As a threshold matter, the Court concludes that the Base Fee regulates evenhandedly and without regard to origin. The Base Fee effectuates a legitimate local interest. The legislature found, among other things, that: the volume of hazardous wastes being disposed of in Alabama has increased dramatically; the state incurs a permanent risk to the health of its people and the maintenance of its natural resources; and Alabama incurs substantial economic costs related to hazardous waste management such as regulatory costs and spill cleanup. Additionally, the evidence at trial documented specific threats to human health and the environment posed by the Emelle facility. Clearly, the state of Alabama has a legitimate interest in imposing fees on commercial hazardous waste facilities to address the serious financial, environmental and other risks they create.

It is well-settled that states' regulatory powers are greatest when they address traditional matters of local concern such as environmental and natural resource regulation. *Kassel v. Consolidated Freightways*, 450 U.S. 662, 670, 101 S.Ct. 1309, 67 L.Ed.2d 580, 586 (1981). Legislative measures enacted to promote public health and safety are accorded particular deference. *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 443, 98 S.Ct. 787, 54 L.Ed.2d 664, 676 (1978). Challenges to state public safety regulations must overcome a "strong presumption of their validity." *Id.*, 434 U.S. at 444, 98 S.Ct. at 795, 54 L.Ed.2d at 667. Courts will not second-guess legislative judgments about the importance of safety justifications in comparison with the burdens on interstate commerce. *Kassel*, 450 U.S. at 670, 67 L.Ed.2d at 587. States retain broad authority under their general police powers to regulate matters of legitimate local concern even though interstate commerce is affected. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

When a police power regulation is challenged under the Commerce Clause, one of two tests is applied. If the regulation is discriminatory on its face or in practical effect, the state must show that (1) the regulation has a legitimate local purpose; (2) the regulation serves this interest; and (3) reasonable nondiscriminatory alternatives, adequate to preserve the legitimate local purpose, are not available. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). This is the "strict scrutiny" test.

If no facial discrimination is involved, a "balancing test" is applied to determine the constitutional validity of statutes:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be

upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Pike v. Bruce Church, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). If a legitimate local purpose exists, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

CWM has failed to establish that the Base Fee has discriminatory effects on interstate commerce. The mere fact, as CWM argues, that most of its customers are out-of-state generators does not establish discrimination against interstate commerce. The United States Supreme Court has stated that even if the burden of a state regulation falls most often on out-of-state companies, this burden "does not, by itself, establish a claim of discrimination against interstate commerce." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987); *see also Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981); *Exxon Corp. v. Gov. of Maryland*, 437 U.S. 117, 126 (1978). The strict scrutiny test does not apply in these circumstances.[1]

The Base Fee does not facially discriminate against out-of-state waste. All waste disposed of at Alabama commercial hazardous waste facilities is subject to the $25.60 fee. Consequently the *Pike v. Bruce Church* balancing test will be applied to assess the fee's constitutional validity. In balancing the interests at stake, the Court finds that the burden the Base Fee imposes on interstate commerce is not clearly excessive in relation to the benefits it produces. The fee benefits the state, on the other hand, by compensating it for the financial responsibilities and risks it bears on account of commercial hazardous waste disposal activities. Thus, a comparison of the Base Fee's local benefits to its alleged burden on interstate commerce establishes that any such burden is not clearly excessive. Furthermore, to the extent that the Base Fee does deter hazardous waste landfilling, the fee is a proper instrument of deterrence.[2] Finally, in view of the financial, safety, environmental and other objectives of Act No. 90-326 and the fact that the Base Fee falls evenhandedly on interstate and intrastate waste, it is difficult to imagine how these objectives could be accomplished in ways that have a lesser impact on interstate activities.

[1] The Court deems irrelevant any evidence attributing to any state officials any motive discriminating against interstate commerce. It is well-established that "[i]nquiries into [lawmakers'] motives or purposes are a hazardous matter . . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, . . ." *United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S.Ct. 1673, 1682-83, 20 L.Ed.2d 672, 684 (1968), *cited in, CECOS International, Inc. v. Jorling*, 895 F.2d 66, 73 (2d Cir. 1990).

For these reasons, CWM's Commerce Clause challenge to the Base Fee is without merit.

(2) *The Equal Protection Challenge*

The Equal Protection Clause of the United States Constitution and similar provisions of the Alabama Constitution prohibit the State of Alabama from denying any person equal protection of the law. There is a "presumption of constitutionality which can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364-65 (1973). *See also White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989). "The burden is on the one attacking the legislative arrange-

[2] Similarly, in the forms which the EPA submits in connection with its waste reduction program, the agency asks states to list measures they are taking to reduce the generation of waste; the EPA lists fees as one example of such measure.

ment to negative every conceivable basis which might support it." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). Unless the state statute involves a suspect class or a fundamental right, courts generally will not overturn the statute on equal protection grounds "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the legislature's actions were irrational." *Pennell v. San Jose*, 485 U.S. 1, 14 (1988) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). The statute must be "rationally related to a legitimate state interest." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 81, 108 S.Ct. 1645, 100 L.Ed.2d 62, 74 (1988) (quoting *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985)). If the state legislature's determination that its regulation will serve a legitimate public purpose is "at least debatable," the challenge to that action must fail. *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938). "[C]ourts are not empowered to second-guess the wisdom of state policies." *Western & Southern Life Ins. Co. v. Board of Equalization*, 451 U.S. 648, 670 (1981). This "rational relationship" test is not difficult to pass. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985). Additionally, state regulations dealing with health, welfare and the economy are entitled to deferential Equal Protection review. *Evergreen Waste Systems, Inc. v. Metropolitan Service District*, 643 F. Supp. 127, 133 (D.Or. 1986) (citing *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)); *Railway Express Agency v. New York*, 336 U.S. 106 (1949)). State tax legislation is given great deference. *White v. Reynolds Metals Co.*, 558 So. 2d at 380. States are free to impose taxes on different trades and professions, and may vary the tax rates on different products. *Id.* (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527-27 (1959)). Because the Base Fee provision involves neither a suspect class, such as race, nor a fundamental right, such as free speech, this Court must analyze the statute under the above-described, lenient "rational relationship" test, *see Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-96 (1983), asking 1) whether the provisions have a legitimate purpose, and 2) whether it was "reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose. . . ." *Western & Southern Life Ins. Co.*, 451 U.S. at 668.

CWM argues that the Base Fee deprives it of equal protection of the law because it only applies to *commercial* hazardous waste facilities, and its Emelle operations constitute the only such facility in Alabama. The Court does not agree with this contention. First, the Court does not agree with the implication that CWM has somehow been "singled out" because the Base Fee, as a practical matter, only applies to it. There is no evidence to suggest that Act No. 90-326 will not apply to commercial hazardous waste facilities which are sited in Alabama in the future. Until that time, any regulation of commercial hazardous waste facilities will necessarily fall on CWM alone. This fact, however, does not prevent the legislature from regulating CWM's operations.[3]

Second, the Court finds that the legislature's treatment of commercial hazardous waste facilities differently from non-commercial facilities is rationally related to legitimate state interests. The evidence at trial established several reasons for the differentiation. For example, the use of commercial disposal sites poses unique health and safety risks, such as the transportation of dangerous materials to the sites with the risk of accidents involv-

[3] CWM's claim that the legislature was motivated by improper motivations is also irrelevant for equal protection purposes. "[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of those who voted for it." *Palmer v. Thompson*, 403 U.S. 217, 224, 91 S.Ct. 1940, 1944, 29 L.Ed.2d 438 (1971), *cited in CECOS International v. Jorling*, *supra*, 895 F.2d at 73.

ing such transportation, and the accumulation in one place of extremely large volumes of different types of waste. The number of trucks delivering hazardous waste to the Emelle facility alone was approximately 40,000 during 1989, and was expected to increase in subsequent years. Hazardous waste disposal at non-commercial facilities, however, does not involve transportation of the materials to be disposed of, with the dangers inherent in and unique to such transportation. Such facilities dispose of their waste on-site. In *CECOS International, Inc. v. Jorling*, 895 F.2d 66 (2d Cir. 1990), the plaintiffs argued that a state law requiring siting board approval for the expansion of commercial, but not non-commercial, hazardous waste facilities violated equal protection. The Second Circuit rejected this argument because the state provided several reasons for applying this requirement to commercial facilities. The reasons included the fact *"that there are greater risks associated with commercial facilities because hazardous wastes must be transported to the off-site commercial facility."* *Id.* at 73 (emphasis supplied). The State of Alabama has offered similar reasons for the classification now before the Court.

Moreover, commercial landfill facilities comprise the bulk of the hazardous waste accumulation problem. The waste disposed of at commercial facilities exceeds many times the waste disposed of on site by non-commercial facilities. Additionally, without regard to the health, safety and environmental concerns, and viewing the fees simply as taxes, the legislature is not precluded from taxing a commercial transaction simply because it does not impose the tax on a similar noncommercial activity. Many constitutionally permissible tax measures treat different taxable entities in different ways.

Thus, CWM has failed to meet its burden of negating every conceivable basis which might support Act No. 90-326's differing treatment of commercial and non-

commercial facilities. *White v. Reynolds Metals Co., supra.* The differentiation serves a legitimate purpose and it was reasonable for the legislature to believe that the classification promotes that purpose. This Court, therefore, must defer to the legislature's classification of these two types of facilities.

(3) *The Due Process Challenge*

Article I, section 6 of the Alabama Constitution states, among other things, that no accused in a criminal prosecution shall be deprived of life, liberty, or property except by due process of law. This right has been extended to civil trials. *Ross Neely Express, Inc. v. Alabama Dep't of Environmental Management*, 437 So. 2d 82, 84 (Ala. 1983). In order to avoid violating the Due Process Clause of the Alabama Constitution, a legislative classification must be reasonable and not arbitrary. *White v. Associated Industries of Alabama, Inc.*, 373 So. 2d 616, 617 (Ala. 1979).

The Base Fee is reasonable in function. It provides some financial assurance against the risks associated with materials posing a permanent threat to health, safety and the environment. The burden imposed is not an excessively heavy one. While CWM's right to maximize profits is certainly important, it does not by any stretch of the imagination outweigh the state's interest in protecting the health and safety of its citizens and environment. Under any kind of "rational and reasonable" analysis, therefore, the Base Fee is clearly valid.

B. *THE CAP PROVISION*

(1) *The Commerce Clause Challenge*

The Court now turns to the question of whether the "Cap" provision violates the Commerce Clause. This provision states that no commercial hazardous waste disposal facility which takes in more than 100,000 tons of

hazardous waste annually may dispose of more waste in the year starting October 1, 1991 than it disposed of during the statutory benchmark period, regardless of the origin of the waste. The position of CWM would allow it, and not the Alabama legislature, to determine what volume of hazardous waste will be buried permanently in the state. CWM insists that the Cap provision, like the fees, is an impermissible legislative interference with its rights to dispose of and to bury in Alabama whatever volume of such waste that it wishes. This Court disagrees, and concludes that the Cap provision is no more violative of the Commerce Clause than the Base Fee, and for many of the same reasons.

The Cap provision applies equally to in-state and out-of-state waste. Accordingly, the *Pike v. Bruce Church* balancing test must be utilized to assess its validity under the Commerce Clause. Like the Base Fee, the Court finds that the Cap provision regulates evenhandedly to effectuate a legitimate local interest. Tonnage restrictions which apply equally to all waste, regardless of origin, do not violate the Commerce Clause. *Wetzel County Solid Waste Authority v. West Va. Div. of Natural Resources*, 1990 WL 257380 (W.V.Sup.Ct. of Appeals, Dec. 19, 1990). The state has a clear and legitimate interest in conserving its natural resources—the Selma chalk and the Eutaw aquifer—and in protecting the health and safety of its citizens. The state also has a legitimate interest in protecting the environment surrounding the Selma chalk and the Eutaw aquifer and in extending the life of the landfill for the benefit of in-state and out-of-state waste generators. The Cap provision promotes this interest without discrimination by limiting the amount of waste that can be disposed of at Emelle during any 12-month period. *See County of Washington v. Casella Waste Management, Inc.*, 1990 WL 208709 (N.D.N.Y. Dec. 6, 1990) (stating that local law prohibiting all out-of-county solid waste served a legitimate local purpose in protecting public health and

safety as well as the environment, and noting that one of the legitimate effects of the local law might be to extend the useful life of safe landfills); *and Bill Kettlewell Excavating, Inc. v. Michigan Dept. of Natural Resources*, 732 F.Supp. 761 (E.D.Mich. 1990) (holding that statute requiring county approval for disposal of out-of-county solid waste served legitimate purpose of extending lives of the county's landfills). The Cap provision also furthers Alabama's legitimate interest in controlling health and safety risks by, in effect, regulating the amount of waste being transported on the state's highways and to its landfills. The Court again notes that landfilling is the least desirable form of waste disposal as it poses a perpetual threat to the ground and surface waters in the landfill's vicinity and to the surrounding environment. The Cap provision necessarily encourages the development of new technologies to supplement and minimize hazardous waste landfilling.

Finally, any burden which the Cap provision might place on interstate commerce is speculative. The Cap limits the amount of waste in successive years only to that amount landfilled during the 1990-91 benchmark period. This Court in this opinion finds the $72.00 Additional Fee on out-of-state generated waste to be unconstitutional. The Court in the relief portion of this opinion specifically holds that the volume cap for future years may not be based on a benchmark period which includes any time during which the unconstitutionally discriminatory fee was assessed. As noted in the relief section, a new benchmark period may be required. Thus, the Cap creates no discriminatory burden on existing levels of commerce or on existing rates of waste generation and landfilling. The Cap provision permits increased volumes if such is warranted in accord with safety or to comply with State or federal regulations.[4] Thus, the Cap pro-

[4] The Court notes that the Cap provision contains the following language: "Provided, however, that the Governor or the Governor's

vision merely furthers the policy that future growth in the amounts of such waste to be disposed of must be accompanied by growth in the development and use of safer and more environmentally sound methods of disposal. (See § 9 of the Act 90-326).

(2) *The Supremacy Clause Challenge*

CWM alleges that the Cap provision comes into conflict with three federal statutes: the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C.A. §§ 6901 *et seq.*, which governs treatment and disposal of solid waste, the Toxic Substances Control Act ("TSCA"), 15 U.S.C.A. §§ 2602 *et seq.*, which regulates the disposal of toxic wastes such as PCBs, and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C.A. §§ 9601 *et seq.*, which provides federal funding for cleanup of hazardous and toxic substances. CWM's Emelle facility operates under permits issued in accordance with these federal statutes, and CWM argues that the Cap provision directly conflicts with either the provisions or the goals of all three. The Court disagrees, and will treat each statute in turn.

(a) *The Cap Provision Does Not Conflict With, Frustrate, or Impede the Operation of RCRA.*

RCRA, as amended in 1983, is a "cradle-to-grave" regulatory program which sets standards for the generation, treatment, storage, and disposal of hazardous waste. RCRA is designed to promote several goals with regard to hazardous waste: 1) assuring that hazardous waste

---

designee may allow disposal of hazardous wastes or hazardous substances in excess of the tonnage disposed of during the benchmark period if such action is determined by the Governor or the Governor's designee to be necessary to protect human health or the environment in the state, or to allow the state to comply with its obligations to assure disposal capacity pursuant to applicable state or federal law as determined by the Governor or his designee." *Act 90-326, § 9.*

management is conducted in a way that protects human health and the environment; 2) requiring that hazardous waste be properly managed from the outset; and 3) minimizing the generation of hazardous waste and the landfilling of hazardous waste by encouraging process substitution, materials recovery, recycling, and treatment. 42 U.S.C.A. § 6902(1), (4)-(6). The statute implements a national policy of minimizing the generation of hazardous waste and safely treating waste that has already been generated. 42 U.S.C.A. § 6902(b).

RCRA demonstrates a strong policy against landfilling. In the congressional findings accompanying the 1983 amendments, Congress found that "reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least-favored method for managing hazardous wastes . . . ." 42 U.S.C.A. § 6901(b)(7). Congress also maintained that alternatives to land disposal "must be developed." *Id.* at § 6901(b)(8). The floor debates which preceded the passage of the amendments repeatedly emphasized concerns about the dangers of landfill disposal. Congresswoman Schneider stated that the bill required a "direct economic disincentive for the land disposal of hazardous waste," and advocated supplementing the measure with "economic incentives that encourage alternatives to land disposal." 29 CONG. REC. pt 17 (1983), p. 23164. Congressman Walgren argued,

> In my view, our society should seriously question the continued land disposal of hazardous wastes. If we can find ways to dispose or neutralize hazardous waste instead of dumping it in the ground, we should. Ground disposal is inherently dangerous because subsequent contamination of liners in landfills can be penetrated with underground water. There are other ways to dispose of wastes that we should turn to.

Id. at p. 23163. Congressman Frenzel similarly stated, "continued reliance on land disposal of hazardous wastes

is a dangerous policy which threatens the health of Americans now and in the future." *Id.* at p. 23161.

In light of these concerns, this Court finds that the Cap provision is consistent with what Congress had in mind when passing RCRA—reducing the amount of landfilled waste—and furthers, rather than frustrates the purpose of RCRA. The Cap provision is a mechanism which will encourage generators to find ways other than landfilling to dispose of their hazardous wastes, and this is exactly what Congress emphasized in RCRA.

Further, RCRA directly addresses the question of federal/state supremacy. Section 6929 states that no state may impose treatment and disposal requirements less stringent than those prescribed in RCRA, and further states, "Nothing in this chapter shall be construed to prohibit any state . . . from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations." RCRA sets a floor, a minimum level of regulation by which all states must abide. State actions or regulations which go above that floor—which are more stringent than RCRA —are expressly permitted. The Cap provision, being more stringent than the requirements of RCRA, is clearly permissible. In short, there is no indication that the Cap provision conflicts with or impedes the operation of RCRA in any way.

(b) *The Cap Provision Does Not Conflict With, Frustrate, or Impede the Operation of TSCA.*

TSCA regulates the handling of toxic chemical substances and mixtures in an attempt to promote the promulgation of adequate data concerning the risks involved with such substances. In particular, Congress wishes through TSCA to encourage technological innovation, while at the same time ensuring that such innovation did not "present an unreasonable risk of injury to health or the environment." 15 U.S.C.A. § 2601(b)(3).

Again, in light of this policy, the Court finds that the Cap provision, one effect of which will be to encourage the development of alternative disposal technologies while minimizing the amount of waste landfilled, does not "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting TSCA," as CWM claims. In light of express congressional policy discouraging and disfavoring the practice of burying such highly dangerous materials in the ground, the Court cannot conceive that Congress, in enacting TSCA, intended to grant landfill operators a right to bury unlimited amounts of such materials. Nor does the Court find that such unlimited burial is necessary to the implementation of that Act.

(c) *The Cap Provision Does not Conflict With, Frustrate, or Impede the Operation of CERCLA.*

"[T]he primary purpose of CERCLA is the prompt cleanup of hazardous waste sites." *State of Alabama v. United States Environmental Protection Agency*, 871 F.2d at 1557-58 (quoting *Dickerson v. Administrator, EPA*, 834 F.2d 974, 978 (11th Cir. 1987)). CERCLA allows the Administrator to promulgate regulations involving substances which, when released, could cause harm to the environment. 42 U.S.C.A. § 9602(a). It requires anyone who has knowledge of the release of such a substance greater than a designated amount to notify the United States government. 42 U.S.C.A. § 9603. Whenever such a release occurs, CERCLA authorizes the President to remove the substance and/or provide for remedial action, or to take any other response "consistent with the national contingency plan." 42 U.S.C.A. § 9604 (a). Along with 26 U.S.C.A. § 9507, CERCLA establishes a trust fund, commonly known as "Superfund," to be used to pay costs incurred by the government in providing this help. 42 U.S.C.A. § 9611.

CWM argues that the Fee Act's Cap provision artificially requires the Emelle facility to withhold capacity

that otherwise would be available immediately for the disposal of waste generated at Superfund cleanup sites located outside of the State of Alabama, and that the provision "undermines Congress' goal of making the best use of existing waste treatment and disposal facilities in the short term." CWM's argument is based on the assumption that Alabama has the burden under CERCLA of meeting the capacity assurance requirements of other states. This Court does not agree. CERCLA places the capacity assurance burden on the state *generating* the waste, not on the state importing it. Alabama is not required to provide enough capacity to dispose of all of the waste generated in the United States during the next twenty years; it has to assure the President only that it can provide capacity to dispose of *its own* waste during that period.

Again, CWM is arguing that a statute designed to protect and promote health, safety and environmental quality indirectly evidences a congressional policy which directly conflicts with the *express* congressional policy against landfilling. CWM would have the Court construe CERCLA as being inconsistent with the policy clearly stated in another congressional enactment addressing the same general environmental quality concerns. This Court cannot find that Congress, in providing for clean-up of the results of past unsound waste disposal practices, intended to imply a policy conflicting with its expressly stated condemnation of reliance on landfilling.

(3) *The Due Process Challenge*

Economic and social legislation, such as that involved herein, falls under the substantive component of the Due Process Clause, and the standard for evaluating its validity is virtually identical to the Equal Protection "rational relationship" test. *In re Wood*, 866 F.2d 1367, 1371 (11th Cir. 1989).

> [Economic and social legislation] generally will be upheld against a substantive due process attack unless the legislation "manifests a patently arbitrary classification, utterly lacking in rational justification." *Fleming v. Nestor*, 363 U.S. 603, 611 . . . (1960). As with the "rational relationship" test, *any* plausible reason supporting Congress' action in enacting the suspect legislation satisfies the "rational basis" test. *Id.* at 612, 80 S.Ct. at 1373.

Id. (emphasis in the original). This Court's analysis of CMW's Due Process challenge to the Cap provision, therefore, is very similar to its analysis of CWM's Equal Protection claims.

CWM contends that the Cap provision "arbitrarily and irrationally" deprives it of its property interest in the Emelle facility in violation of the Due Process Clause. However, where, as here, restrictions on waste disposal are related to the state's goal of preserving and managing landfill space and in protecting the health and safety of its citizens, such restrictions do not violate due process. *Bill Kettlewell Excavating, Inc. v. Michigan Dept. of Natural Resources*, 732 F.Supp. 761, 765 (E.D. Mich. 1990). Moreover, the state's reasons for treating hazardous waste buried in commercial facilities differently from industrial waste buried on site are rational and are not arbitrary. The Cap provision is rationally related to reducing the transportation and accumulation of hazardous waste and similar dangerous substances in the state. When such a rational basis for a statute exists, it does not violate the Due Process Clause.

(4) *The Contracts Clause Challenge*

Article I, section 10 of the federal Constitution makes it unlawful for states to impair the obligations of contracts. Although debtor relief laws were the primary focus of the Contracts Clause, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502-503 (1987),

the Clause has since been applied to other kinds of laws, including state laws that have the incidental effect of altering contractual obligations. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). A state statute does not violate the Contracts Clause "simply because it has the effect of restricting, or even barring altogether, the performance of duties created by contracts entered into prior to its enactment." *Exxon Corp. v. Eagerton*, 462 U.S. at 190. Rather, a court analyzing a Contracts Clause claim must employ a balancing test.

First, the court must determine whether the state law has in fact substantially impaired the contractual relationship. *Spannaus*, 438 U.S. at 244.

> The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Id. at 245, Second, if the law does substantially impair the contractual rights, the state must show that the law was designed to promote a legitimate public purpose, such as remedying a general social or economic problem. *Energy Reserves Group v. Kansas Power and Light Co.*, 459 U.S. 400, 411-412 (1983). Finally, if the statute is shown to have a legitimate public purpose, the state must show that the law is based on reasonable conditions and that it is of a character appropriate to the public purpose. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 445-47 (1934). In making this determination, courts defer to the legislative judgment if the regulation involved is social or economic. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22-23 (1977).

Applying the above analysis, the conclusion is clear that the Cap provision does not violate the Contracts

Clause. First, CWM has made no showing that the Cap provision has impaired its existing contracts. Second, even had CWM presented some proof that the Cap provision impaired its existing contracts, it is clear that the law was designed to promote a legitimate public purpose. Finally, as discussed above, the Cap provision is based on reasonable conditions: it allows CWM and the out-of-state generators to determine the cap amount. Moreover, it is of a character to promote the public purpose—it will prevent the amount of hazardous waste buried in the state from increasing in subsequent years. All three elements of the test balance in favor of the Cap provision.

(5) *The Takings Clause Challenge*

Under the Fifth Amendment to the United States Constitution, government is prohibited from taking private property for public use without just compensation. The question to be answered in determining whether the Takings Clause has been violated is whether the governmental action amounts to a "taking" requiring compensation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). To make this determination, a court must determine 1) whether there is a property interest involved, *see e.g., Andrus v. Allard*, 44 U.S. 51, 65-66 (1979); and 2) whether that property interest has been diminished—in a case like the present one, whether there has been a diminution in the economic viability of the property by the state regulation, *see Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 485-86, or whether state infringement of the private property right was done in the legitimate exercise of Police Power or to advance a legitimate state interest and whether the infringement operates to further that interest, *see Id.; Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). If the result of this analysis indicates that there has in fact been a taking, the remedy is generally payment of

just compensation. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-42 (1987).

The Cap provision has not effected a "taking" within the meaning of the Takings Clause. This Court has already established several times over the fact that the Cap provision—indeed, the Fee Act as a whole—advances legitimate state interests. It is equally clear that the Cap provision has not made it commercially impracticable for CWM to continue operating its Emelle facility. CWM still owns the Emelle facility in its entirety. Its use has not been changed or restricted; it is still a commercial hazardous waste disposal facility. Comparing, then, "the value that has been taken from the property with the value that remains in the property," *DeBenedictis*, 480 U.S. at 497, the Court concludes that even if some diminution in value has occurred, it by no means would constitute a taking requiring compensation under the Takings Clause.

C. *The Challenge Under § 70 of the Alabama Constitution*

The Court finds that enactment of the Fee Act did not violate Article IV, Section 70 of the Alabama Constitution. Article IV, section 70 of the Alabama Constitution provides:

> All bills for raising revenue shall originate in the house of representatives. The governor, auditor, and attorney general shall, before each regular session of the legislature, prepare a general revenue bill to be submitted to the legislature, for its information, and the secretary of state shall have printed for the use of the legislature a sufficient number of copies of the bill so prepared, which the governor shall transmit to the house of representatives as soon as organized, to be used or dealt with as that house may elect. The senate may propose amendments to revenue bills. No revenue bill shall be passed during the last five days of the session.

CWM asserts that the Fee Act is a revenue bill which was enacted during the last five days of the legislative session, and that the enactment thus violated the last sentence of Article IV, section 70.

This Court finds that the Fee Act is not a "revenue bill" within the meaning of section 70. In *Woco Pep Co. of Montgomery v. Butler*, 142 So. 509 (Ala. 1932), the Alabama Supreme Court explained the meaning of the term "revenue bill" as it appears in the last sentence of section 70. The Constitution of 1875 contained only the first sentence of the present section 70. When the provision was rewritten for the Constitution of 1901, the last three sentences were added, defining a "general revenue bill" and explaining how such a bill was to be enacted. The Supreme Court considered the added sentences in conjunction with the remarks of the committee chairman who presented the revision to the Constitutional Convention, and came to the conclusion that the last sentence of section 70 "was intended by the Constitution makers to apply only to *the general revenue bill*." *Id.* at 511 (emphasis added). The Court held that the fact that the Constitution makers revised the penultimate sentence of section 70 to authorize the Senate to propose amendments to the general revenue bill and to amend specific bills for raising revenue only strengthened its conclusion that the term revenue bill "related exclusively to and affected general revenue bills." *Id. See also Opinion of the Justices*, 115 So. 2d 464, 467-68 (Ala. 1959); *Opinion of the Justices*, 115 So. 2d 484, 485 (Ala. 1959); *Opinion of the Justices*, 66 So. 2d 921, 923 (Ala. 1953); *Dorsky v. Brown*, 51 So. 2d 360, 362 (Ala.), *cert. denied*, 342 U.S. 818 (1951). Because the Fee Act is not a general revenue bill, but a specific measure, section 70 does not apply.

D. *THE $72 ADDITIONAL FEE*

Although the Legislature imposed an additional fee of $72.00 per ton on waste generated outside Alabama, there is absolutely no evidence before this Court that waste

generated outside Alabama is more dangerous than waste generated in Alabama. The Court finds under the facts of this case that the only basis for the additional fee is the origin of the waste.

The Commerce Clause of the United States Constitution bars the States from erecting barriers against interstate commerce. *See, e.g., Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361, 373-374 (1964); *H. P. Hood & Sons v. Dumond*, 336 U.S. 525, 537-539 (1949). It is settled that the Commerce Clause prevents a State from discriminating, solely on the basis of origin, against waste generated in other States by subjecting such waste to more restrictive regulation than waste generated within the State. In *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), for example, the United States Supreme Court overturned a New Jersey statute barring the disposal within New Jersey of waste generated in other states. More recently, the United States Court of Appeals for the Eleventh Circuit struck down an Alabama law barring disposal within Alabama of hazardous waste generated in certain other States. *National Solid Wastes Management Ass'n v. Alabama Dep't of Environmental Management*, 910 F.2d 713 (1990) *panel rehearing denied*, —— F.2d ——, (Feb. 7, 1991) (*"NSWMA"*). Another court recently issued a preliminary injunction against enforcement of South Carolina statutes and regulations that restricted the disposal within that State of hazardous waste generated in other States. *Hazardous Waste Treatment Council v. State of South Carolina*, Civil Action No. 3:90-1402-O (D.S.C. Jan. 11, 1991).

In this opinion, this Court has recognized that serious problems associated with hazardous waste plague our nation. *See National Solid Waste Management*, 910 F.2d at 715-716. The Eleventh Circuit pointed out that however honorable and well intentioned Alabama's leaders might be in coming to grips with environmental problems, it is the duty of the courts to guard against unconstitutional discrimination and interference with interstate commerce. *See id.* at 725. A higher fee based solely on origin is not constitutionally permissible. The settled law as set forth by both the Supreme Court in *City of Philadelphia* and by the Eleventh Circuit in *NSWMA* leaves this Court with no choice but to hold that the Additional Fee violates the Commerce Clause under the facts here presented.

First, the Additional Fee affects interstate commerce within the meaning of the Commerce Clause. The substances subject to the Additional Fee—non-hazardous waste and hazardous waste—have been held to be articles of commerce within the purview of the Commerce Clause. *City of Philadelphia; NSWMA.*

Second, the Additional Fee facially discriminates against waste generated in States other than Alabama ("out-of-state waste"). By its very terms, the fee applies *only* to out-of-state waste. Waste generated within Alabama ("in-state waste") is completely exempted from the Additional Fee. The Additional Fee therefore clearly and unequivocally discriminates against interstate commerce.[5]

Once a state law is found to discriminate on its face against interstate commerce, the law may be upheld only if the State carries the heavy burden of "showing that [the statute] advances a legitimate local purpose that

---

[5] Defendants have suggested that the discriminatory character of the Additional Fee is less than that of the Alabama statute invalidated by the Eleventh Circuit because the latter statute discriminated among States other than Alabama, banning importation of waste from only certain States, while the Additional Fee discriminates against all States other than Alabama. However, the U.S. Supreme Court has made clear that the scope of a statute's discrimination against interstate commerce is legally irrelevant. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 276 (1988). Certainly the fact that the Additional Fee discriminates against more States does not improve its status under the Commerce Clause.

cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988). "[T]he standards for such justification are high." *Id.; see also Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (a reviewing court must engage in "the strictest scrutiny of any purported legitimate local purpose and of the absence of discriminatory motives"). Indeed, courts routinely reject attempts to justify statutes that discriminate against interstate commerce and instead hold such statutes invalid under the Commerce Clause. *See, e.g., New Energy Co., supra; Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. (1984); *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Hughes, supra; City of Philadelphia, supra; Boston Stock Exchange v. State Tax Comm'r*, 529 U.S. 318 (1977); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *NSWMA, supra.*

This Court has carefully reviewed the entire record in this case, including the legislative findings contained in Act No. 90-326. This Court finds that hazardous waste generated in Alabama is just as dangerous as such waste generated in other states. All of the safety and environmental concerns set forth at trial and as contained in the findings of fact of this Court apply with equal force to hazardous waste generated in and out of the State of Alabama. Moreover, the Act in question contains no distinction as to the type of hazardous waste, the degree of dangerousness, or as to what type of hazard minimization procedures to which the waste may or may not have been subjected in other states. This Court finds that the record contains no evidence of any difference between in-state waste and out-of-state waste other than the waste's state of origin.

Defendants also argue that Alabama has a legitimate interest in forcing other States to assume responsibility for handling disposal of waste generated in those States. That argument also was rejected by the Eleventh Circuit in the *NSWMA* case. 910 F.2d at 720-721. Furthermore, the U.S. Supreme Court has held that "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *City of Philadelphia*, 437 U.S. at 627.

Finally, defendants assert that the Additional Fee is justified because it is part of Alabama's waste minimization program. The Court finds that the Additional Fee is not an evenhanded waste minimization effort; rather, the Legislature imposed a discriminatory burden on out-of-state waste. Based on the record before it, the Court further finds that the mandatory $72 per ton Additional Fee is not equivalent to the waste minimization program for in-state generators, which consists of seminars and engineering advice available to in-state generators on a voluntary basis. For example, the Additional Fee applies to waste generated in States that have minimization programs for in-state generators that are comparable to Alabama's program for in-state generators. The Additional Fee also applies to waste that cannot be minimized because it results from the cleanup of old unsafe disposal sites. Moreover, the Additional Fee imposes a considerable monetary cost on out-of-state generators that is significantly more burdensome than Alabama's voluntary incentive program for in-state generators.

The Court further finds that there are reasonable nondiscriminatory means by which Alabama could further the goal of waste minimization. In particular, the State could impose a mandatory fee that falls even-handedly on both in-state waste and out-of-state waste or it could adopt the same voluntary program for both. The base fee could be increased to cover all waste, both in-state and out-of-state. As hereafter noted, the State could constitu-

tionally charge a higher fee based on the degree of dangerousness, the nature of the waste or the lack of hazard minimization measures. What the Commerce Clause forbids is a significantly heavier burden that is imposed by the Additional Fee based on the origin of the waste.[6] The Additional Fee therefore is invalid under the Commerce Clause.[7]

The Court concludes that the remainder of Plaintiff's challenges to the Act are without merit.

In deciding this case this Court has been mindful of the principals enunciated by the Supreme Court of Alabama in *White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989). The Court has applied the principles of *White* to the facts now before this Court. Specifically, this Court recognizes that it is "the duty of the Court to

[6] Defendants also tried to justify the Additional Fee on the ground that it makes out-of-state generators pay their fair share of the costs of Alabama waste disposal facilities. The Court finds that defendants failed to adduce any evidence that (1) in-state generators bore a disproportionate share of these costs prior to the enactment of the Additional Fee other than the legislative findings with regard to the volume of out-of-state hazardous waste, or (2) the $72 fee equalizes the burden on in-state and out-of-state generators. Even if defendants had presented such evidence, the U.S. Supreme Court's decision in *American Trucking Ass'ns. Inc. v. Scheiner*, 483 U.S. 266, 287-289 (1987), would require rejection of their argument. The Court further finds that defendants failed to justify the Additional Fee as a "compensatory tax" because they have not identified a "substantially equivalent" tax imposed solely on in-state waste. *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 244 (1987); *Armco Inc. v. Hardesty*, 467 U.S. 638, 643 (1984); *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981).

[7] As noted above, the Eleventh Circuit's decision in *NSWMA* indicates that the State might be able to set different tax levels for different types of waste on the basis of, for example, the degree of dangerousness of the waste. The legislature could choose to not tax non-hazardous waste at Emelle, and tax less dangerous or treated waste at a lower rate than more dangerous waste. The particulars of any such tax law would, of course, have to be analyzed under the applicable constitutional standard.

sustain the Act unless it is clear beyond a reasonable doubt that it is violative of the fundamental law." *Id.* at 383. The additional fee provision of Act 90-326 obviously treats hazardous waste generated outside of Alabama differently from hazardous waste generated in the State of Alabama. The evidence here fails to show any distinction whatsoever in the degree of dangerousness between in-state and out-of-state hazardous waste. The only basis for the difference in treatment is origin. This distinction has been repeatedly held constitutionally impermissible.[8]

V. RELIEF

This Court has upheld the legality of the Base Fee and the Cap provisions of Act 90-326. The Court has further held the Additional Fee provision of the Act to be violative of the Commerce Clause of the Constitution. Section 10 of the Act contains a severability clause. Therefore, the Additional Fee levied in Section 3(b) of the Act may be severed from the Act and this severance shall not affect the remaining portions of the Act.

The Court must now address the appropriate relief available to the Plaintiffs for the payment of fees pursuant to the $72 Additional Fee provision. The Plaintiffs in seeking injunctive and declaratory relief have not specifically requested relief in the form of a refund for fees paid pursuant to the challenged provisions. This Court however has previously noted that the remedies available to the Plaintiffs, should they prevail, would include the statutory provisions of the Fee Act itself, Sec-

[8] In addition, the Supreme Court in *White* found that the provisions of the Alabama Constitution presented the legislature with a "difficult problem of imposing franchise tax, because Section 229 and Section 232 prescribe different methods of imposing the tax." The Court also noted in *White* that . . . "Alabama tax laws that in some cases favored domestic incorporation and in others favor doing business here as foreign corporations cannot be said to violate the Commerce Clause." These are clear differences in the facts before the Court in *White* as compared with those now before this Court.

tion 22-30B-13, *Code of Alabama*, and other general provisions of law, including Section 40-1-34 and section 40-2-22, *Code of Alabama*. (See orders of July 13, 1990 and August 30, 1990). As discussed below, a refund is one alternative form of relief from the unconstitutional provision.

If a state requires a taxpayer to pay a tax prior to obtaining a determination of its validity, the Due Process Clause of the 14th Amendment to the United States Constitution requires that a post-payment remedy be provided. *McKesson Corporation v. Florida Alcohol and Tobacco Division*, —— U.S. ——, 110 S.Ct. ——, 110 L.Ed. 2d 17 (1990). *McKesson* makes it clear, however, that a refund is not necessarily the required form of relief. In the case of a tax which impermissibly discriminates against interstate commerce, it is a remedy for the *discrimination* which is required, not relief from the tax.

Under *McKesson* the past discrimination may be cured either by a refund, by a retroactive increase in the lower discriminatory tax rate, or by a combination of a partial refund and a partial retroactive increase. *Id.*, 110 L.Ed. 2d at 38-39. What is required is that the resultant tax actually assessed during the period does not, in hindsight, discriminate against interstate commerce. *Id.* The State retains flexibility in responding to a determination that a tax is impermissibly discriminatory, and may reformulate and enforce the tax retroactively during the contested period in any manner consistent with the requirements of the Commerce Clause. *Id.* at 38. "Having done so, the State may retain the tax appropriately levied upon [the taxpayer] pursuant to this reformulated scheme because this retention would deprive [that taxpayer] of its property pursuant to a tax scheme that is valid under the Commerce Clause." *Id.* The State is free to choose the form of relief, so long as that relief satisfies the requirements outlined in *McKesson*. *Id.* at 45.

It is important to note that it is the *discrimination* which is invalid—not the higher rate, nor the lower rate, but the *difference*. It is this difference which must be corrected retroactively, either by refund of amounts paid under the higher rate, retroactive assessment of the higher rate across the board, or something in between.

McKesson holds that *the State* must remedy the discrimination, and that *the State* is free to choose the form of relief. It does not say that *the state court* must choose the form of remedy in the first instance. It is the opinion of this Court that the legislature of the State of Alabama should have an opportunity to correct the portion of Act 90-326 which the Court finds to be constitutionally impermissible. The Court finds that choosing an appropriate and constitutional remedy should, in the first instance, be left to the legislature. Under separation of powers principles, the levying of taxes and fees, as well as the formulation of public policy regarding health, safety and the environment, is a function of the legislature. The enforcement of public policy and the collection of taxes and fees, as established by the legislature, is a function of the executive branch. Therefore, this Court is of the opinion that these branches have the responsibility to determine and should have the opportunity to determine which alternative form of correction of the discrimination is to be implemented to further the public policy as established by the legislature. Of course, if the discrimination is not remedied in accordance with the requirements of *McKesson*, it becomes the duty of the Court to provide relief. Under § 6-6-230, Code of Alabama (1975), this Court retains jurisdiction to grant relief whenever necessary or proper.

This Court permanently enjoins Defendants from collection of the Additional Fee, but such injunction shall be stayed until adjournment of the next regular session of the legislature, which begins on April 16, 1991. The Court finds that immediate injunction is unnecessary and

inappropriate. Ultimate relief is guaranteed by *McKesson*, and this Court retains jurisdiction to ensure that such relief will be provided. Under *McKesson*, the State may remedy the discrimination by creating, retroactively, a non-discriminatory fee at a level which would result in the same total amount of fees and perhaps an even greater amount being due. If this is what the legislature chooses to do, an injunction at this point would constitute unwarranted interference with the proper collection of legally assessed fees.

The legislature, by the $72.00 Additional Fee, attempted to create an economic disincentive to discourage landfilling of the waste involved in this case. The Additional Fee, however, was based entirely on the origin of the waste and is constitutionally impermissible. The legislature could choose to further its policies by distinguishing among wastes based on the type of waste and the degree of dangerousness of various types of wastes or upon utilization or lack of utilization of hazard minimization measures rather than solely on the basis of state of origin. This Court will not presume which form of remedy might be chosen. Pending legislative action, the Court will stay its injunction against collection temporarily, while retaining jurisdiction to provide relief if the State fails to correct the unconstitutional nature of the fee structure.

This Court has upheld the constitutionality of the Cap provisions of the Act. However, the benchmark period to establish the cap on volumes disposed of in future years began simultaneously with the effective date of the Additional Fee. In seeking a preliminary injunction at an early stage of these proceedings, Plaintiff argued that, to the extent that its volume of business would be reduced by passing on the Additional Fee as an increase in charges to its customers, the effects of the Additional Fee would be perpetuated in the form of a reduced volume limitation.

Whether the results of an unconstitutionally discriminatory fee will be perpetuated, and therefore require relief, will depend on the form of the remedy ultimately implemented to correct the discriminatory fees. If, in hindsight, Plaintiff's costs or charges were in fact increased by invalid fees during the period, volume may have been reduced as a result. If the legislature chooses to retroactively impose non-discriminatory fees by extending the Additional Fee to in-state waste received during the period, however, the discrimination may well have been cured.

Because the determination of whether the volume cap is influenced by unconstitutionally discriminatory fees depends on the form of correction of the discrimination, it cannot be determined at this time whether Plaintiff has been damaged in this regard by the discriminatory fees. However, if the remedy implemented involves payment of a refund, in whole or in part, then the Plaintiff's payments during the benchmark period will have been increased by an unconstitutional fee. In that event some form of relief, which may include establishment of a new benchmark period or an injunction against enforcement of a cap which perpetuates the effects of discriminatory fees, will be necessary. This depends on the action taken by the legislature and will be addressed by the Court if the remedy chosen by the legislature makes such relief necessary or if the legislature does not choose to enact any remedial legislation. The volume cap for future years may not be based on a benchmark period which includes any time during which an unconstitutionally discriminatory fee was assessed. This Court retains jurisdiction and will entertain an appropriate motion by Plaintiff seeking such relief as may be necessary to remedy the discrimination in the event the State does not do so, including relief from the effect of discriminatory fees on the volume cap.

This retention of jurisdiction to implement further relief does not affect the finality of the Court's Order declaring the Additional Fee provision of the Act to be invalid under the Commerce Clause and declaring the validity of the Base Fee and Cap provisions. This determination decides the material issues of fact and law involved, determines the legal rights of the parties and the principles by which such rights are to be worked out, and is therefore intended to be an appealable final order in that regard. *See Miles v. Bank of Heflin*, 328 So.2d 281, 285 (Ala. 1975); *McCulloch v. Roberts*, 276 So.2d 425, 427 (Ala. 1973).

An Order and Injunction will be entered this date in accordance with the foregoing Findings of Fact and Conclusions of Law.

Done this the 28th day of February, 1991.

/s/ Joseph D. Phelps
JOSEPH D. PHELPS
Circuit Judge

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

Civil Action No. CV-90-1098-PH

CHEMICAL WASTE MANAGEMENT, INC., PLAINTIFF

vs.

THE ALABAMA DEPARTMENT OF REVENUE; JAMES M. SIZEMORE, JR., as Commissioner of the ALABAMA DEPARTMENT OF REVENUE; and GUY HUNT, as Governor of Alabama, DEFENDANTS

ORDER AND INJUNCTION

This Court today, by entry of its Findings of Fact and Conclusions of Law, incorporated herein by reference, has declared the "Base Fee" and "Cap" provisions of Act 90-326 to be valid and constitutional, and has declared the $72.00 per ton "Additional Fee" imposed on out-of-state hazardous waste by Act 90-326 to be impermissible and invalid under the Commerce Clause of the United States Constitution.

The holding of the U. S. Supreme Court in *McKesson Corp. v. Florida Alcohol and Tobacco Division*, —— U.S. ——, 110 S. Ct. 2238, 110 L.Ed. 2d 17 (1990) requires and guarantees a retroactive remedy of the discriminatory effect of the Additional Fee on interstate commerce. This Court has found that the Alabama Legislature should have the opportunity to correct the unconstitutional discrimination against interstate commerce in accordance with the alternatives available to the State under *McKesson*. Because the guarantee of relief under *McKesson* makes immediate injunctive relief unnecessary and because the alternatives available to the Legislature make such injunctive relief unwarranted and undesirable, the Court will stay its injunction against enforcement

until the Legislature has had the opportunity to correct the constitutionally impermissible fee structure.

Therefore, it is hereby ORDERED, ADJUDGED and DECREED that the Additional Fee is invalid and unconstitutional; that the Base Fee and Cap provision are valid and constitutional; and that Act No. 90-326 was not enacted in violation of § 70 of the Alabama Constitution. Judgment is entered in favor of Plaintiff on Count I of the complaint, and judgment is entered in favor of the Defendants on the remaining Counts. Judgment is also entered in favor of Plaintiff on Defendant Hunt's counterclaim to the extent it seeks a declaration of the Additional Fee's validity, and in favor of Defendant Hunt in all other respects.

It is further ORDERED, ADJUDGED and DECREED that Defendants are permanently enjoined from collecting the $72.00 per ton "Additional Fee" imposed on out-of-state waste by Act 90-326.

It is further ORDERED, ADJUDGED and DECREED that this injunction shall be stayed until and shall become effective upon the adjournment of the 1991 Regular Session of the Alabama Legislature.

Each party will bear its own costs.

DONE this the 28th day of February, 1991.

/s/ Joseph D. Phelps
JOSEPH D. PHELPS
Circuit Judge

APPENDIX C

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

July 11, 1991

Montgomery Circuit Court
CV-90-1098

1901043

GUY HUNT, as Governor of the State of Alabama

v.

CHEMICAL WASTE MANAGEMENT, INC.

CERTIFICATE OF JUDGMENT

Affirmed in Part, Reversed in Part

The appeal in this cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the circuit court is affirmed in part, reversed in part, and the cause is remanded to the circuit court for further proceedings consistent with the opinion this day delivered in this cause by this Court.

IT IS FURTHER ORDERED that the costs of appeal be taxed one-half to appellant(s) and one-half to appellee(s).

OPINION BY SHORES, J.

Hornsby, CJ., Maddox, Almon, Adams, Steagall and Ingram, JJ., concur; Houston, J., concurs in the judgment.

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

July 11, 1991

Montgomery Circuit Court
CV-90-1098

1901044

JAMES M. SIZEMORE, JR., as Commissioner of the Alabama Department of Revenue, and the ALABAMA DEPARTMENT OF REVENUE

v.

CHEMICAL WASTE MANAGEMENT, INC.

CERTIFICATE OF JUDGMENT

Affirmed in Part, Reversed in Part

The appeal in this cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the circuit court is affirmed in part, reversed in part, and the cause is remanded to the circuit court for further proceedings consistent with the opinion this day delivered in this cause by this Court.

IT IS FURTHER ORDERED that the costs of appeal be taxed one-half to appellant(s) and one-half to appellee(s).

OPINION BY SHORES, J.

Hornsby, CJ., Maddox, Almon, Adams, Steagall and Ingram, JJ., concur; Houston, J., concurs in the judgment.

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

July 11, 1991

Montgomery Circuit Court
CV-90-1098

1901106

CHEMICAL WASTE MANAGEMENT, INC.

v.

THE ALABAMA DEPARTMENT OF REVENUE, *et al.*

CERTIFICATE OF JUDGMENT

Affirmed in Part, Reversed in Part

The appeal in this cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the circuit court is affirmed in part, reversed in part, and the cause is remanded to the circuit court for further proceedings consistent with the opinion this day delivered in this cause by this Court.

IT IS FURTHER ORDERED that the costs of appeal be taxed one-half to appellant(s) and one-half to appellee(s).

OPINION BY SHORES, J.

Hornsby, CJ., Maddox, Almon, Adams, Steagall and Ingram, JJ., concur; Houston, J., concurs in the judgment.

APPENDIX D

Reps. Holley, Turner, Fuller, Hammett, Newton (C)

H. 310

Enrolled, An Act,

This bill amends Sections 22-30B-1, 22-30B-2, 22-30B-3, 22-30B-11, and 22-30B-15, Code of Alabama 1975, which relates to fees for disposal of hazardous waste and hazardous substances, so as to provide for certain definitions; to impose additional fees and to provide for distribution thereof; to provide for certain exemptions; to provide for certain restrictions on disposal; to provide a cap on the amount of hazardous waste and hazardous substances disposed of during any twelve-month period beginning October 1, 1991, said cap being a function of the amount of hazardous waste and hazardous substances disposed of during the twelve-month period beginning July 15, 1990, and ending July 14, 1991, and the purpose of said cap being the prevention of an artificial decrease in fees during the twelve-month period beginning July 15, 1990, and ending July 14, 1991.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Section 22-30B-1 of the Code of Alabama 1975 is hereby amended by inserting the following new section and renumbering all existing sections accordingly.

Section 22-30B-1. Legislative Findings. The legislature finds that:

(a) The state is increasingly becoming the nation's final burial ground for the disposal of hazardous wastes and materials;

(b) The volumes of hazardous wastes and substances disposed in the state have increased dramatically for the past several years;

(c) The existence of hazardous waste disposal activities in the state poses unique and continuing problems for the state;

(d) As the site for the ultimate burial of hazardous wastes and substances, the state incurs a permanent risk to the health of its people and the maintenance of its natural resources that is avoided by other states which ship their wastes to Alabama for disposal;

(e) The state also incurs other substantial costs related to hazardous waste management including the costs of regulation of transportation, spill cleanup and disposal of ever-increasing volumes of hazardous wastes and substances;

(f) Because all waste and substances disposed at commercial sites for the disposal of hazard waste and hazardous substances, whether or not such waste and substances are herein defined as hazardous, contribute to the continuing problems created for the state, and because state and federal definitions of "hazardous wastes" have regularly changed and are likely to change in the future to include waste not previously defined as hazardous, it is necessary that all waste and substances disposed of at a commercial site for the disposal of hazardous waste or hazardous substances be included within the requirements of this act;

(g) The legislature finds that the public policy of the state is to encourage business and industry to develop technology that will eliminate the generation of hazardous waste and substances. The legislature finds that substantial progress has been made in the implementation of hazardous waste disposal programs in the secondary lead recovery industry and that such technology will be generally available by October 1, 1992. Therefore, the intent of the legislature is that fees assessed herein against the operators of commercial sites for the disposal of hazardous waste or hazardous substances not be ap-

plied until after October 1, 1992, to waste disposed of at such sites by secondary lead smelters to the extent that said fee exceeds the fees in effect on the date of passage of this Act.

(h) Since hazardous wastes and substances generated in the state compose a small proportion of those materials disposed of at commercial disposal sites located in the state, present circumstances result in the state's citizens paying a disproportionate share of the costs of regulation of hazardous waste transportation, spill cleanup and commercial disposal facilities. Persons, firms or corporations which generate and dispose of such waste and substances in Alabama presently are among the taxpaying citizens of this state who must bear the burden of the regulation, inspection, control and clean-up of hazardous waste sites; addressing the public health problems created by the presence of such facilities in the state; and, preserving this state's environment while those generating this waste in other states and shipping it to Alabama for disposal presently are not. This act attempts to resolve that inequity by requiring all generators of waste being disposed of in Alabama to share in that financial burden.

(i) The operators of commercial sites for the disposal of hazardous wastes or hazardous substances have the ability to control the flow of said wastes or substances into said sites. Further, said operators, by exercise of said ability to control the flow of wastes or substances disposed at sites during a twelve-month period, only to enlarge the amount of wastes disposed during the next twelve-month period by a proportionate amount. The health of the population of this state and the soundness of the environment of this state are and would be threatened by such an exercise of control. Said exercise of control could cause an artificial decrease in fees during the twelve-month period beginning July 15, 1990, and ending July 14, 1991. To prevent threats to the health of the

population of this state and to the soundness of the environment of this state and to prevent an artificial decrease in fees during the twelve-month period beginning July 15, 1990, and ending July 14, 1991, this act provides a cap on the amount of hazardous waste and hazardous substances disposed during the twelve-month period beginning October 1, 1991, said cap being a function of the amount of hazardous waste and hazardous substances disposed during the twelve-month period beginning July 15, 1990, and ending July 14, 1991.

Section 2. Section 22-30B-1 is amended as follows:

Section 22-30B-12. When used in this act and except where the context prohibits, the following words and terms shall have the following meanings:

(1) COMMERCIAL SITE FOR THE DISPOSAL OF HAZARDOUS WASTE OR HAZARDOUS SUBSTANCES. A site or facility receiving hazardous waste or hazardous substances, as defined herein, not generated on site, for disposal and to which a fee is paid or other consideration given for such disposal.

(2) DISPOSAL. The discharge, deposit, injection, dumping, spilling, incineration, leaking or placing of any waste or substance into or on any land or water so that such waste or substance or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters including groundwaters at a commercial site within the State of Alabama for the disposal of hazardous waste or hazardous substances as defined herein. For the purpose of this act incineration does not include hazardous substances or waste that have been blended for use as a fuel in conformance with state and federal requirements.

(3) HAZARDOUS SUBSTANCE(S). Any substance defined as a hazardous substance pursuant to 42 U.S.C. § 9601(14), as amended, or listed as a hazardous waste pursuant to the Code of Alabama 1975, Section 22-30-10, as amended.

(4) HAZARDOUS WASTE(S). Those wastes defined at Section 22-30-3(5), Code of Alabama 1975, as amended, or listed pursuant to Section 22-30-10, Code of Alabama 1975, as amended, or department regulations.

(5) OPERATOR. Any person, firm, or corporation owning or operating such facility or site.

(6) TON. A short ton of 2,000 pounds.

Section 3. Section 22-30B-2 is amended as follows:

Section 22-30B-23.

(a) In addition to other fees levied, there is hereby levied a fee to be paid by the operators of each commercial site for the disposal of hazardous waste or hazardous substances in the amount of 25.60 per ton for all waste or substances disposed of at such site.

(b) For waste and substances which are generated outside of Alabama and disposed of at a commercial site for the disposal of hazardous waste or hazardous substances in Alabama, an additional fee shall be levied at the rate of 72.00 per ton.

(c) In addition to the fees levied hereinabove, there is hereby levied a total of 9.00 per ton to be paid by the operators of each such commercial site for the disposal of hazardous wastes or hazardous substances in accordance with the following:

(1) Eight Dollars per ton effective October 1, 1989, $7.00 of which shall be deposited in the General Fund of the State to be used for general operations; and $1.00 of which shall be deposited to the credit of the general fund of the county wherein such commercial hazardous waste disposal site is located, and all such proceeds shall be expended for such purposes as may be appropriated by local act.

(2) Fifty cents per ton effective October 1, 1990, shall be deposited to the credit of the general fund of the

county wherein such commercial hazardous waste disposal site is located, and all such proceeds shall be expended for such purposes as may be appropriated by local act;

(3) Fifty cents per ton effective October 1, 1991, shall be deposited to credit of the general fund of the county wherein such commercial hazardous waste disposal site is located, and all such proceeds shall be expended for such purposes as may be appropriated by local act.

(d) Fees assessed herein against the operators of commercial sites for the disposal of hazardous waste or hazardous substances shall not be applied until after October 1, 1992, to waste disposed of at such sites by secondary lead smelters to the extent that said fees exceed the fees in effect on the date of passage of this amendatory act; provided, however, that any business or industry which is exempt from the payment of any fees or taxes levied by this Act that fails to develop and implement the technology to eliminate the generation of hazardous wastes and substances by October 1, 1992, shall pay to the General Fund of the State of Alabama an amount equal to the additional fees and taxes levied by the provisions of this Act that would have been due and payable at that time by the provisions of this Act. Provided, further, that in order for any taxpayer to qualify for such exemption, a petition on a form provided by the Department of Revenue must be submitted to the Department of Revenue within thirty (30) days of the effective date of this Act. Said petition shall provide that the exempted taxpayer acknowledge awareness of the provisions of this Act.

Section 4. Section 22-30B-3, Code of Alabama 1975, is hereby amended to read as follows:

Section 22-30B-34. The proceeds from the fee herein levied, less the department of revenue's actual cost for administration and collection, not to exceed 10 percent,

shall be deposited into the general budgetary fund of the state to be used for general operations unless provided otherwise in this chapter.

Section 5. Section 22-30B-11 is amended as follows:

Section 22-30B-112. Any operator of a commercial site for the disposal of hazardous waste or hazardous substances shall maintain written records of all such waste or substances received for disposal at the site and all waste or substances disposed of at the site. Said records shall contain the names and addresses of all persons, firms or corporations transporting and delivering such waste or substances to said facility, and the names and locations of all persons, firms or corporations from whence said waste or substance was produced or generated, the quantity of waste or substance received by such commercial hazardous waste or hazardous substance facility, and the date of delivery and such additional information as the commissioner of revenue or director of the department of environmental management reasonably may require for the proper administration and enforcement of the provisions of this act. This record must be a true, accurate and correct statement of the transaction as provided for under the provisions for this act, and any personnel or persons who knowingly make a false or fraudulent statement of a material fact with intent to defraud shall be guilty of a Class C misdemeanor and shall be punished as provided by law. The records required, under the provisions of this act, shall be maintained by the operators of said commercial site for the disposal of hazardous waste or hazardous substances, shall be available, during regular business hours, to any duly authorized agent or employee of the state of Alabama department of revenue or the Alabama department of environmental management, and such records shall be retained by said operators for a period of not less than three years. Any required records for such commercial site for the disposal of hazardous waste or hazardous

substances shall be retained by said operators for a period of not less than three years. Any operator of such commercial site for the disposal of hazardous waste or hazardous substances which shall fail to maintain such records, or in any manner shall cause the falsification of same as to any material matter with an intent to defraud, shall be guilty of a Class C misdemeanor and shall be punished as provided by law.

Sction 6. Section 22-30B-15 of the Code of Alabama 1975 is hereby amended as follows:

Section 22-30B-156.

(a) It shall be unlawful for any person to print or publish in any manner whatever the fee report of any operator or any part thereof of the fees due thereon or to divulge to any person, except persons required or authorized to collect or audit or assist in collecting or auditing the reports or to use the information contained in any such report or acquired in auditing any such report or enforcing the provisions of this chapter for any purpose except for the audit of such report and collection of the fee imposed by this chapter, unless the fee thereby imposed becomes delinquent; any person violating the provisions of this section shall be deemed guilty of a misdemeanor and shall be fined not to exceed $500.00 or sentenced to hard labor for the county for not more than 90 days, one or both for each offense, and upon conviction thereof any such person shall thereafter be ineligible to hold the office of commissioner or become or be an employee or agent of the department of revenue or under the department of revenue; provided, that the provisions of this section shall not apply to exchanges of information between the Alabama department of revenue and the Alabama department of environmental management when used for the purpose of administering the provisions of this chapter.

(b) Any assistant or agent of the department of revenue who shall willfully refuse to perform the duties im-

posed upon him by this chapter or by the department of revenue shall be deemed guilty of a misdemeanor and shall be fined not exceeding $500.00 or sentenced to hard labor for the county for not more than 90 days, one or both, for each offense.

(c) All reports and information secured by officials or employees of the department of revenue for the purpose of arriving at fees shall be kept under lock and key by the department of revenue, and any official or employee of the state or of any county who shall divulge the contents ~~thereof~~ except under order of court shall be guilty of a Class C misdemeanor and shall be punishable as provided by law, and any person found guilty of violating this provisions of this chapter shall thereafter be ineligible to hold the office of commissioner or become or be an employee or agent of the department of revenue.

Section 7. (a) There is hereby provided to all counties having less than twenty-five thousand (25,000) population and wherein at the time of passage of this act a commercial site for the disposal of hazardous waste or hazardous substances is located an annual payment of two and one-half percent (2½%) of the additional eighteen dollars ($18) per ton gross receipts generated by subsection (a) and the additional seventy-two dollars ($72) per ton generated by subsection (b) of Section 3 of this Act that become effective July 15, 1990.

(b) Said counties as identified in subsection (a) above are hereby guaranteed an amount not to exceed the lesser of four million two hundred thousand dollars ($4,200,000) or one hundred percent (100%) of the receipts to the State paid on wastes or substances disposed of in said county. In determining whether said counties are entitled to receive benefit of all or any portion of the guarantee herein made, there shall be charged against said counties all receipts which they receive pursuant to this chapter and the provisions of Alabama Act 83-480 or other applicable local act.

(c) Determination of entitlement to the guarantee shall be made annually by the Governor or his designee not later than November 15. Such determination shall be the difference of this chapter and Alabama Act 83-480 and any other applicable local act for the twelve-month period ending the previous September 30 as compared to the applicable guarantee amount.

(d) In the event the guarantee provided in subsection (b) is required to be exercised, the Department of Revenue shall, within ten (10) days of notification from the Governor or his designee, certify to the state finance director that an appropriate amount as determined in subsection (c) from the first receipts generated by this act in each fiscal year shall be paid to the appropriate county commission. The state finance director is hereby authorized to cause to be paid from current state revenues generated by this Act said amount which shall be paid as a reduction of current fiscal year revenues to the state, which said payment shall not in any event exceed an amount equal to the total current fiscal year revenues generated by this Act and paid into the state treasury. The county commission shall, within ten (10) days of receipt of said funds, disburse the funds according to the provisions of Alabama Act 83-480 or other applicable general or local laws.

Section 8. For the purpose of providing funds, not to exceed four million five hundred thousand dollars ($4,500,000) during any fiscal year of the State, for the Alabama Public Health Finance Authority to pay at their respective maturities the principal of, premiums, if any, and interest on any bonds issued by it under the provisions of House Bill 114 of the Regular Session of 1990 or Senate Bill 84 of the Regular Session of 1990, there is hereby irrevocably pledged for said above purpose and hereby appropriated the annual amount necessary, not to exceed four million five hundred thousand dollars ($4,500,000) during any fiscal year of the State, from the

first receipts after payment of any guarantees in Section 7 of this Act of the incremental fees that are levied on the disposal of hazardous waste or hazardous substances pursuant to this act and that were not theretofore appropriated and paid into the General Fund of the State of Alabama (i.e., the amount resulting from the incremental fee of $18.00 per ton for all waste or substances disposed of at each commercial site for the disposal of hazardous waste or hazardous substances and the amount resulting from the additional fee of $72.00 per ton for all waste and substances which are generated outside of Alabama and disposed of at each commercial site for the disposal of hazardous waste or hazardous substances). The Alabama Public Health Finance Authority referred to in this section may be organized pursuant to House Bill 114 of the Regular Session of 1990 or Senate Bill 84 of the Regular Session of 1990, either of which bills may be enacted before or after this act. Provided, however, if said Alabama Public Health Finance Authority is not in existence on the effective date of this act, the funds provided for in this section shall be deposited into the state general fund until enactment of legislation establishing the aforementioned Alabama Public Health Finance Authority.

Section 9. Any commercial site for the disposal of hazardous waste or hazardous substances that disposes of in excess of 100,000 tons of hazardous waste or hazardous substances during the twelve-month period beginning July 15, 1990, and ending July 14, 1991, (hereinafter referred as the benchmark period) shall not, during any twelve-month period beginning October 1, 1991, and any twelve-month period thereafter, dispose of more than the tonnage received during said benchmark period. Such restriction shall be in addition to any other ban or restrictions on disposal imposed by any regulatory authority. Provided, however, that the Governor or the Governor's designee may allow disposal of hazardous wastes or hazardous substances in excess of the tonnage disposed of

during the benchmark period if such action is determined by the Governor or the Governor's designee to be necessary to protect human health or the environment in the state, or to allow the State to comply with its obligations to assure disposal capacity pursuant to applicable state or federal law as determined by the Governor or his designee.

Section 9. Nothing in this amendatory act or any other law shall prohibit the enactment of any local law levying an additional fee to be paid by the operators of commercial sites for the disposal of hazardous waste or hazardous substances.

Section 10. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 11. This act shall become effective on July 15, 1990, upon its approval by the Governor, or upon its otherwise becoming a law.

/s/ James A. Clark
Speaker of the House of
Representatives

/s/ Ryan W. Gassenried, Jr.
President Pro Tem and Presiding Officer of the Senate

House of Representatives

I hereby certify that the within Act originated in and was passed by the House February 8, 1990, as amended.

John W. Pemberton
Clerk

Senate	April 5, 1990	Amended and Passed

House	April 5, 1990	Concurred in Senate Amendment

[No. 90-326, Received Apr. 17, 1990, Secretary of State]